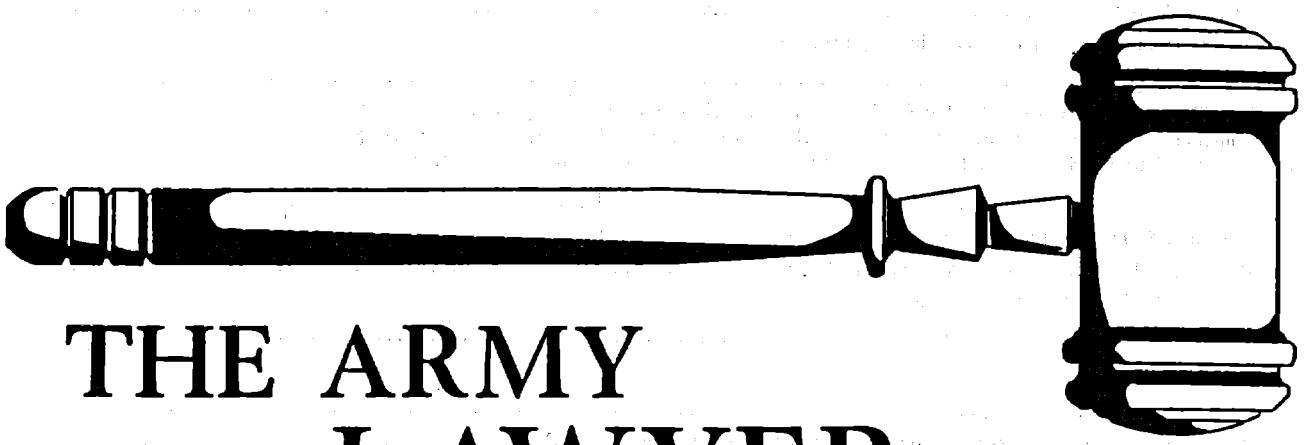

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Table of Contents

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The NATO Mutual Support Act in the USCENTCOM Area of Operations: A Primer

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Introduction

The NATO Mutual Support Act of 1979 (NMSA or 1979 Act)[1] provided for the acquisition of logistic support, supplies, and services from the governments of the North Atlantic Treaty Organization (NATO) countries. Its purpose was to sustain elements of U.S. Armed Forces deployed in Europe.[2] In addition, the NMSA authorized the Secretary of Defense to enter into agreements with NATO governments for the reciprocal provision of logistic support, supplies, and services. These agreements were called "cross-servicing agreements."[3] The National Defense Authorization Act of 1987 (NDAA87)[4] made significant changes to the NMSA. Most significantly, the NDAA87 made it possible to apply the NMSA to non-NATO countries.[5]

Under the NDAA87, the Secretary of Defense may acquire logistic support, supplies, and services from non-NATO countries for elements of the U.S. Armed Forces that are deployed or will be deployed in those countries.[6] The NDAA87 also authorized the Secretary of Defense to negotiate and implement agreements with non-NATO countries for the provision of logistic support, supplies, and services.[7]

These changes to the NMSA have had a far-reaching effect on procurement in Southwest Asia,[8] the area of responsibility of the U.S. Central Command (USCENTCOM) and the Army Central Command (ARCENT). Much of ARCENT's procurement is from foreign governments, either because the foreign government so requires or because the United States determines that the foreign country is best able to provide the supply or service required. ARCENT and USCENTCOM, therefore, have often used the provisions of the NMSA. The NMSA has enabled ARCENT and USCENTCOM to procure supplies and services without having to use the Federal Acquisition Regulation (FAR).[9] The inapplicability of the FAR has had a significant effect on how ARCENT and USCENTCOM do business.

The purpose of this article is twofold. First, it is to give an overview of what a lawyer should know about procurement under NMSA authority in Southwest Asia. Second, the article will provide an overview of ARCENT's methodology of conducting NMSA procurements. The article will examine the basics of the NMSA and those definitions important to understanding the amended Act. It will then discuss the documents that implement the amendment's application to the USCENTCOM area of responsibility and the lines of authority that have been created. Finally, the amended Act's impact on procurement in the USCENTCOM area of responsibility will be discussed.

The NMSA, as Amended, in a Nutshell

Prior to when the NDAA87 made it possible to apply the NMSA to non-NATO countries, the FAR applied to all procurements in Southwest Asia and in all other non-

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* The author wishes to thank Major Thaddeus J. Keefe, III and Captain K.J. Wheaton for their substantial assistance in the preparation of this article.

[1] Pub. L. No. 96-323, 94 Stat. 1016 (1980), as codified in 10 U.S.C. § 2321-2331. The section numbers in the U.S. Code were changed from 2321—2331 to 2341—2350 by the Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 1304, 99 Stat. 583, 741-42 (1985). For the sake of uniformity, this paper will use the amended section numbers throughout.

[2] 1980 U.S. Code Cong. & Admin. News 2420.

[3] Pub. L. No. 96-323, 94 Stat. 1016 (1980).

[4] Pub. L. No. 99-661, § 1104, 100 Stat. 3816, 3963 (1986).

[5] "NATO Mutual Support Act," of course, was made a misnomer by the NDAA87. Accordingly, the NDAA87 changed the chapter title in which the NMSA is found from "North Atlantic Treaty Organization Acquisition and Cross-Servicing Agreements" to "Acquisitions and Cross-Servicing Agreements with NATO Allies and Other Countries." Pub. L. No. 100-26, § 7(a)(8), 100 Stat. 273, 278 (1987).

[6] 10 U.S.C. § 2341(2) (1988). For further explanation, see note 15 and accompanying text.

[7] 10 U.S.C. § 2342(a)(2) (1988). For further explanation of the limitations in this section, see note 16 and accompanying text.

[8] An area roughly equivalent to the area known as the Middle-East.

[9] The value to ARCENT of the inapplicability of the FAR is discussed at note 10 and accompanying text. *See infra* note 47 and accompanying text for ARCENT's argument for the FAR not applying to NMSA procurements.

NATO countries.[10] This created unnecessary and sometimes politically embarrassing requirements. For example, prior to the NDAA87, the contracts with foreign governments in USCENTCOM's area of responsibility were subject to the requirement to examine the books and records of the contractor. The FAR clause to this effect was required in all procurements from foreign governments. Inclusion and use of clauses like this, however, violate the sovereignty of a foreign state.

Any contract in USCENTCOM's area of responsibility was also subject to competitive requirements. If a country required that supplies or services be procured from it, ARCENT contracting officials had to submit justifications and approvals for sole source procurements from that sovereign nation. This created unnecessary paperwork for the contracting officials. Finally, some foreign governments may have felt that it was inappropriate or condescending for the United States to contract with them instead of entering into an international agreement. In Southwest Asia, honor is extremely important, and the United States did not want to create the impression that the parties were less than equal.[11] By making it possible to apply the NMSA to countries in the USCENTCOM area of responsibility, the NDAA87 has enabled contracting personnel to procure from foreign governments without the inclusion in the procurement documents of embarrassing, unnecessary, and arguably demeaning statutorily-required clauses.

Two provisions contained in the 1979 Act are important to contracting in the USCENTCOM area of responsibility:

1) Logistic support, supplies, and services may be acquired or transferred on a reimbursement basis or by replacement-in-kind or exchange of supplies or services of an identical or nearly identical nature.[12]

2) Nine federal statutory provisions do not apply to NMSA agreements by which supplies or services are procured, whether they are cross-servicing agreements entered into under the authority of 10 U.S.C. § 2342 or acquisition agreements under the authority of 10 U.S.C. § 2341.[13] The provisions made not applicable are limitations on gratuities, the requirement for competitive bids, prohibition against cost-plus-percentage-of-cost contracts, covenant against contingent fees, required notice to the agency under a cost-plus-a-fixed-fee contract, requirement to submit certified cost and pricing data, examination of books and records of the contractor, officials not to benefit, and the application of the Cost Accounting Standards Board.[14]

Other than editorial changes, the NDAA87 added the following to the NMSA:

1) DOD may acquire logistic support, supplies, and services from non-NATO countries that have a defensive alliance with the United States; that permit the stationing of members of our armed forces in the country; that agree

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[10] Generally, the FAR applies to all acquisitions. *See* FAR 1.103. An acquisition is defined as "[t]he acquiring by *contract*.... FAR 2.101 (emphasis added). Until the application of the NMSA to procurement in the USCENTCOM area of responsibility, all procurement was by contract, and the FAR, therefore, applied. Under NMSA authority, however, procurements are either international agreements or orders pursuant to international agreements. *See* Dep't of Defense Dir. 5530.3, International Agreements (June 11, 1987), and, therefore, are not contracts. *See infra* note 47 and accompanying text for the rationale of why the FAR does not apply to procurement agreements entered into under the NMSA.

[11] *See* R. Patai, The Arab Mind (3d ed. 1983), for an excellent discussion of the importance of honor to the Arab people.

[12] 10 U.S.C. § 2344(a) (1988). The statute reads: "[l]ogistics support, supplies, and services may be acquired or transferred by the United States under the authority of this chapter on a reimbursement basis or by replacement-in-kind or exchange of supplies or services of an identical or substantially identical nature." Due to the lack of a congressional definition, it is the author's opinion that "reimbursement" is procurement by means of money. The only other type of reimbursement conceivable is the exchange or "trade" of goods or services, but the statute distinguishes exchange from reimbursement. "Reimbursement," therefore, must be limited to procurement using money. Congress must also have intended the terms "replacement-in-kind" and "exchange" to mean different methods of payment since it used both terms in the statute. "Replacement-in-kind implies trade of supplies or services of an identical nature; "exchange" implies the trade of supplies or services of a substantially identical nature. This difference, however, is slight, and for simplicity this article will refer to both as "exchange."

[13] 10 U.S.C.A. § 2343(b) (West Supp. 1989).

[14] The full statutory citations are as follows:

10 U.S.C. § 2207 (1988), Expenditure of appropriations: limitation (limitation on gratuities).

10 U.S.C. § 2304(a) (1988), Contracts: competition requirements (requirement for competitive bids).

10 U.S.C. § 2306(a) (1988), Kinds of contracts (prohibition against cost-plus-percentage-of-cost contracts).

10 U.S.C. § 2306(b) (1988), Kinds of contracts (warranty against contingent fees).

10 U.S.C. § 2306(e) (1988), Kinds of contracts (prime contractor under a cost or a cost-plus-a-fixed-fee contract required to give prior notice of a cost-plus-a-fixed-fee subcontract or a fixed-price subcontract or purchase order of more than a specified amount).

10 U.S.C.A. § 2306(f) (West Supp. 1989), Kinds of contracts (requirement to submit certified cost and pricing data).

10 U.S.C.A. § 2313 (West 1983 & Supp. 1989), Examination of books and records of contractor.

41 U.S.C. § 22 (1988), Interest of Member of Congress (officials not to benefit).

50 U.S.C. App. § 2168 (1982), Cost Accounting Standards Board.

to preposition United States material in the country; or that serve as the host country to military exercises that include elements of the United States Armed Forces.[15]

2) DOD may enter into agreements with non-NATO countries to provide logistic support, supplies, and services pursuant to those agreements, in return for the reciprocal provision of logistic support, supplies, and services to elements of our forces located in the country or in the military region in which the country is located.[16] In order for the Secretary of Defense to designate a non-NATO country eligible for an agreement, the Secretary of Defense, after consultation with the Secretary of State, must determine that the designation is in the national security interests of the United States and must notify the appropriate committees in the Senate and House of Representatives at least thirty days before the Secretary makes the designation.[17]

3) During peacetime, DOD may not accrue more than $10 million worth of reimbursable liabilities for supplies, services, and logistic support from any one non-NATO country in any fiscal year.[18]

The regulations and messages implementing the NMSA and NDAA87 have developed definitions for several terms used as terms of art in the 1979 Act and the NDAA87. Because these regulatory definitions are frequently used, a complete understanding of what is meant by each of these definitions is important to understanding any discussion of the NMSA and NDAA87.

A "cross-servicing agreement" is one entered into by the Secretary of Defense or his delegate with a NATO country or a designated non-NATO country under which the United States agrees to provide logistic support, supplies, or services to that country for its reciprocal provision to U.S. Armed Forces of logistic support, supplies, and services.[19] Such an agreement establishes principles and provisions for effecting support, but does not bind either country to a number or monetary value of transactions.[20]

An "implementing arrangement" supplements a particular cross-servicing agreement by prescribing details, terms, and conditions for specific logistic support, supplies, services, or events.[21] Implementing arrangements are distinguished from cross-servicing agreements in that implementing arrangements have more precisely defined levels of performance than do cross-servicing arrangements and, therefore, are "sub-agreements" of cross-servicing agreements. For example, an implementing arrangement could be negotiated to cover all exercises, all prepositioning, or all engineering projects in a country.[22] There would, however, be only one cross-servicing agreement with this same country, to which all of these implementing arrangements would be subordinate.

"Eligible countries" are those countries from which the U.S. Armed Forces may acquire, under the authority of 10 U.S.C. § 2341, logistic support, supplies, and services. To be an eligible country, a non-NATO country must meet the criteria of 10 U.S.C. § 2341(2).[23] For non-NATO countries, "designated countries" are any eligible countries authorized by the Secretary of Defense to enter into a cross-servicing agreement with the United States.[24]

DOD Directive 2010.9 defines "acquisition" as the obtaining of logistic support, supplies, or services under either a cross-servicing agreement or an acquisition arrangement with payment in currency, replacement-in-kind, or exchange.[25] This definition, however, creates confusion because, while it defines "acquisition" in the common-use sense of "to obtain" or "to procure," the statute strictly uses the term "acquire" when referring to obtaining logistic support, supplies, and services under the authority of 10 U.S.C. § 2341. It is improper and confusing, therefore, to speak of "acquisition" under a cross-servicing agreement. ARCENT procures or obtains

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[15] 10 U.S.C. § 2341(2) (1988).

[16] 10 U.S.C. § 2342(a)(2) (1988). The statute provides no further explanation of what is meant by the phrase "in return for the reciprocal provision of logistic support, supplies, and services." The Secretary of Defense is required to negotiate the adoption of "pricing principles for reciprocal application" in agreements for the acquisition or transfer of logistic support, supplies, and services on a reimbursement basis. 10 U.S.C. § 2344(b) (1988). DOD regulators have deduced that the term "reciprocal provision" as used in section 2342 concerns the use of reciprocal pricing principles. In brief, DOD regulators have defined reciprocal pricing principles to mean that the buying country is charged no more for logistic support, supplies, and services than the selling country would be charged by its contractors or the buying country is charged no more for logistic support, supplies, and services supplied from the selling country's inventory than the armed forces of the selling country are charged.

[17] 10 U.S.C. § 2342(b) (1988).

[18] 10 U.S.C. § 2347(a)(2) (1988). No more than 2,500,000 can be for supplies, other than petroleum, oils, and lubricants. *Id.*

[19] Dep't of Defense Directive 2010.9, Mutual Logistic Support Between the United States and Governments of Other NATO Countries and NATO Subsidiary Bodies (Sept. 30, 1988) [hereinafter DOD Dir. 2010.9].

[20] *Id.*

[21] *Id.*

[22] USCENTCOM Reg. 700-1, para. 7b(4) (20 Mar. 1989) [hereinafter USCENTCOM Reg. 700-1].

[23] DOD Dir. 2010.9, Encl. 3. *See supra* note 15 and accompanying text for a listing of the criteria.

[24] DOD Dir. 2010.9, Encl. 3. The Secretary of Defense must consult with the Secretary of State and inform Congress prior to designating a country. *See supra* note 17.

[25] *Id.*

supplies and services under a cross-servicing agreement, but does not "acquire" them under a cross-servicing agreement. Thus, the NMSA creates two lines of authority for the obtaining of logistic support, supplies, and services. The first line is under 10 U.S.C. § 2341, and it authorizes the direct acquisition of logistic support, supplies, and service from eligible foreign governments.[26] The second line of authority is under 10 U.S.C. § 2342 and is based on the formation of cross-servicing agreements between the U.S. and designated countries.[27] This article, therefore, will use the word "acquire" solely to mean acquisition under the authority of 10 U.S.C. § 2341.

The 1979 Act provided three definitions, of which only one is important to this discussion. "Logistic support, supplies, and services" is defined as food, billeting, transportation, petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, and port services.[28]

Implementing Documents

In the approximately two years since the NDAA87 became effective, the DOD, Department of the Army (DA), and USCENTCOM have issued messages and regulations and reissued DOD Directive 2010.9[29] in order to help the contracting officer and procurement attorney in the field.

On March 26, 1987, the Office of the Secretary of Defense (OSD) issued a memorandum on the NDAA87's amendments to the NMSA.[30] This memorandum delegated authority to determine 10 U.S.C. § 2341 *acquisition eligibility* and negotiation authority for cross-servicing agreements (10 U.S.C. § 2342 authority) and multi-service implementing arrangements to the Chairman, Joint Chiefs of Staff (CJCS). The Secretaries of the military departments were authorized to *acquire* under 10 U.S.C. § 2341 logistic support, supplies, and services, and to negotiate and conclude implementing arrangements applicable to only a single service component.[31] A subsequent memorandum from OSD announced that Egypt, Israel, Japan, and the Republic of Korea were "designated eligible to enter into cross-servicing agreements with the United States."[32]

On June 22, 1987, the CJCS delegated by memorandum to the Commander, USCENTCOM, among others, the authority to determine the eligibility of countries for U.S. acquisitions and to negotiate cross-servicing agreements with designated countries.[33] This memorandum also placed a limitation on redelegation of this authority to no lower than subunified command or component commanders. A message issued by DA on August 28, 1987,[34] delegated the authority to negotiate and conclude single service implementing arrangements to the action addressees of the message. The action addressees included U.S. Forces Command (FORSCOM), but excluded ARCENT.

On December 14, 1987, USCENTCOM issued a memorandum stating that the following countries in the USCENTCOM area of responsibility were eligible for U.S. acquisitions under the authority of 10 U.S.C. § 2341: Saudi Arabia, Bahrain, Oman, Jordan, Kenya, Somalia, and Egypt.[35] At present, five of these countries

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[26] 10 U.S.C. § 2341 (1988). This section is titled "Authority to *acquire* logistic support, supplies, and services for elements of the armed forces deployed outside the United States" (emphasis added). The section repeatedly uses the verb "acquire."

[27] 10 U.S.C. § 2342 (1988). The title of this section is "cross-servicing agreements." The word "acquire" is not used in this section.

[28] 10 U.S.C. § 2350(1) (1988).

[29] DOD Dir. 2010.9 was previously issued on 7 June 1985. The revised version included the changes made by the NDAA87, but continued the improper use of the term "acquisition."

[30] Memorandum, OSD, 26 March 1987, subject: NATO Mutual Support Act Amendments.

[31] Hereinafter, "single service implementing arrangements."

[32] Memorandum, OSD, 21 May 1987, subject: NATO Mutual Support Act Cross-Servicing Agreements. This memorandum uses the word "eligible" in a confusing manner. As discussed previously, "designate" is a term of art used when referring to cross-servicing agreements. "Eligible" countries are those from which the United States may acquire logistic, support, supplies, and services. An eligible country is not necessarily a designated country.

[33] Memorandum, CJCS, 22 June 1987, subject: Delegation of Authority Pursuant to the NATO Mutual Support Act of 1979, as amended.

[34] Message, HQDA, DALO-PLO, 281332Z Aug. 87, subject: Army Implementation of Amended NATO Mutual Support Act.

[35] Memorandum, CCCC, 14 Dec. 1987, subject: Designation of Countries Eligible for U.S. Acquisitions Under the Provision of the NATO Mutual Support Act, as amended.

are also designated countries, that is, available for the negotiation and conclusion of cross-servicing agreements under the authority of 10 U.S.C. § 2342.[36]

On March 20, 1989, USCENTCOM issued its regulation on NMSA contracting under the title *Logistics, Mutual Logistics Support Between the United States and Governments of Countries Within the USCENTCOM Area of Responsibility*. This valuable publication goes a step beyond DOD Dir. 2010.9. It includes appendices that contain a complete sample NMSA acquisition document; an exhaustive definition of the term logistic support, supplies, and services; a description of standard invoice and payment procedures under NMSA; sample acquisition documents to include an order/receipt form in English/Arabic; pricing and compensation guidelines for NMSA transactions; a NMSA acquisition documentation checklist; and other information of great benefit to the procurement official on the ground.

Authority

As discussed above, authority to procure logistic support, supplies, and services under NMSA, as amended by the NDAA87, is divided into two branches. Under the first branch, the CJCS has the authority to determine the eligibility of countries for United States acquisitions under 10 U.S.C. § 2341 and to negotiate cross-servicing agreements or multi-service implementing arrangements under 10 U.S.C. § 2342 authority. The CJCS has redelegated all of this authority to the unified commands.[37] Under the second branch, the Secretaries of the military services have the authority to acquire under 10 U.S.C. § 2341 of the NMSA and to negotiate and conclude single service implementing arrangements.[38] This Secretarial authority to acquire under 10 U.S.C. § 2341 and to negotiate and conclude single service implementing arrangements has been delegated by the Secretary of the Army to several major commands, including FORSCOM.[39] FORSCOM, however, has not delegated any of this authority to ARCENT.

The question, therefore, is: What authority has devolved to ARCENT? The OSD memorandum of 26 March[40] did not give ARCENT the authority to enter into multi-servicing implementing arrangements and cross-servicing agreements (i.e., authority granted under 10 U.S.C. § 2342). The memorandum specifically states that the authority "to determine the eligibility of countries for U.S. acquisitions using NMSA authority and to negotiate cross-servicing agreements or multi-service implementing arrangements ... with non-NATO countries ... may be redelegated."[41] Implicitly, if the authority may be redelegated, the authority must be redelegated prior to its use by subordinate agencies. Because the CJCS has not redelegated this authority, ARCENT does not have this authority.

Analysis reveals, however, that the authority to acquire (10 U.S.C. § 2341, pursuant to branch 2, above) under the NMSA automatically passed to all appropriate Army procurement officials when the Secretary of the Army received the authority to acquire under the OSD Memorandum dated 26 March 1987.[42] Nothing in this memorandum states that the 10 U.S.C. § 2341 acquisition authority may or must be redelegated. If the Secretary had meant for acquisition to require delegation, he would have explicitly stated that fact, as he did in that same memorandum for cross-servicing agreements and multi-service implementing arrangements. Because he did not so state, therefore, implicitly he did not intend that a specific delegation of authority past the Secretary level be required in order for appropriate procurement officials to acquire logistic support, supplies, and services. Accordingly, the authority to acquire under 10 U.S.C. § 2341 devolved to appropriate procurement officials within the Army upon the delegation of authority to the Secretary of the Army to acquire made by the OSD Memorandum dated 26 March 1987.[43]

Application in the Area of Responsibility

ARCENT's overseas procurement needs are satisfied by both foreign countries and private contractors.[44]

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[36] USCENTCOM Reg. 700-1, App. B. The two countries in the USCENTCOM area of responsibility currently not designated for cross-servicing agreements are Kenya and Somalia.

[37] Message HQDA, DUO-PLO, 281332Z Aug. 87, subject: Army Implementation of Amended NATO Mutual Support Act.

[38] Memorandum, OSD, 26 Mar. 1987, subject: NATO Mutual Support Act Amendments. As mentioned in note 27 and accompanying text, the word "acquire" is used as a term of art throughout the discussion of authority.

[39] Message HQDA, DALO-PLO, 281332Z Aug. 87, subject: Army Implementation of Amended NATO Mutual Support Act.

[40] Memorandum OSD, 26 Mar. 1987, subject: NATO Mutual Support Act Amendments.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] The author has served as ARCENT's procurement advisor since October 1988. His duties have included two lengthy trips overseas to provide legal advice to ARCENT procurement officials as well as the continuous advice to those officials while in CONUS. A large portion of the following discussion is based on his personal experience.

ARCENT procures from foreign countries for several reasons. As previously noted, some countries require the U.S. to procure from them. For some supplies and services, such as heavy equipment transport and prepositioning of equipment, the host nation is the United State's best supplier. Finally, it is often just good politics. Procurement from a foreign nation also allows use of the NMSA, and the flexibility conferred upon ARCENT by use of the NMSA has been very useful. ARCENT, therefore, has frequently used NMSA procurement authority since it first received the right to do so in 1987.

USCENTCOM is actively seeking cross-servicing agreements with countries in its area of responsibility. As noted earlier, cross-servicing agreements provide "umbrella" language for the obtaining of logistic support, supplies, and services pursuant to the agreement.[45] As of 30 November 1989, however, the United States only had a cross-servicing agreement with Jordan. ARCENT, therefore, has had to make extensive use of the 10 U.S.C. § 2341 acquisition authority for its NMSA procurements. When the logistic support, supplies, and services are obtained pursuant to 10 U.S.C. § 2341 acquisition authority, however, each procurement has required the negotiation of the terms of the procurement document. This is very time-consuming for the procuring official because he must negotiate the language of the procurement document before he can even begin to negotiate prices, deliveries, and other requirements.[46]

The ARCENT staff judge advocate has opined that the FAR does not apply to procurements under NMSA authority, which greatly increases the contracting official's flexibility during negotiations. The reasoning is as follows. When the 1979 Act was passed, Congress required DOD to publish implementing regulations and transmit those regulations to Congress. It prohibited any acquisition or transfer under the authority of the Act until the regulations were passed.[47] There were procurement regulations current at the time of the passing of the Act (the Defense Acquisition Regulation, "DAR"). Because Congress explicitly stated that regulations be drafted to cover NMSA transactions, then the DAR was not the regulation that Congress intended to control the procurements made under the aegis of the NMSA. In other words, if Congress had wanted the NMSA procurements to be regulated by the DAR, it could have so stated, rather than requiring that new regulations be published.

In addition, application of the FAR to NMSA procurements vitiates the basic purpose for the enactment of the NMSA. Congress enacted the NMSA to remove the requirement of applying domestic procurement laws and regulations to transactions conducted in the European theater.[48] For reasons of sovereignty, our allies in the European theater felt that agreements, not contracts, were the appropriate method of transferring logistic support, supplies, and services.[49] If the FAR controlled NMSA procurements, only the nine expressly exempted statutory provisions would not apply. This result would force a continuance of the application of the remainder of United States procurement regulations to foreign procurement. Such a result would effectively nullify the congressional purpose for the statute and return our allies to the status of contractors, rather than equal sovereign nations.

The flexibility provided by the NMSA because of the inapplicability of the FAR has often proven crucial in the negotiation of procurements. For example, in recent negotiations incident to a major overseas exercise, the host nation was concerned about the possibility of a sudden and dramatic price rise due to a ministerial decree in the costs of any of the services it was providing. In the previous exercise, the host nation's ministry of transportation had increased the cost of container offloading 250%, to the surprise of both parties. The host nation's ministry of defense, with which ARCENT was again negotiating the NMSA agreement, had to submit a "claim" under the agreement. Payment was delayed for almost two years as ARCENT struggled to obtain the facts of the claim and to determine the legal rationale

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[45] DOD Dir. 2010.9, para. F.7:

> DoD components are encouraged to establish simplified procedures under cross-servicing agreements, implementing arrangements, contracts or other contractual instruments under the NMSA similar to those used in basic ordering agreements, with authority to place orders delegated to the lowest practical and prudent level. Officials delegated authority ... to negotiate and conclude cross-servicing agreements and implementing arrangements may delegate authority to applicable personnel to implement these agreements and arrangements by the issuing and accepting of requisitions or other forms required by these agreements and arrangements.

[46] During recent negotiations for services and supplies to be provided during a major exercise in Southwest Asia, the contracting officer negotiated terms over a ten-day period; negotiated requirements and their prices for ten more days; departed the country, and returned after a two week break for a two-day period of further negotiations before the document was signed.

[47] 10 U.S.C. § 2329 (1982), *repealed by* Pub. L. No. 99-145, § 1304(a)(2), 99 Stat. 583, 741 (1985).

[48] Pribble, *A Comprehensive Look at the North Atlantic Treaty Organization Mutual Support Act of 1979*, 125 Mil. L. Rev. 187 (1989).

[49] *Id.*

under which the claim was to be paid. Based on this experience, the host nation did not want to undergo the "claim" procedure again. It was necessary, therefore, to draft a clause in the NMSA agreement by which the price of any supply or service provided could be increased by an agreed-upon percentage in the event of a ministerially-decreed price increase. The completion of the entire NMSA agreement was delayed pending resolution of this problem. The agreement was not signed until only four weeks prior to the host nation's rendering of the first service negotiated under the acquisition. Under the FAR, ARCENT would have had to obtain a deviation to use such a clause. Without a doubt, ARCENT could not have obtained the approval of the deviation within four weeks. Whether approval would have been forthcoming at all is another question. Without the clause, however, the host nation would not have entered the NMSA agreement and this major biennial exercise would have been in jeopardy.

ARCENT has generally used the NMSA procurement authority to buy host nation support, whether by acquisition under 10 U.S.C. § 2341 or pursuant to a cross-servicing agreement entered into under 10 U.S.C. § 2342. Because of limited opportunities and a general lack of understanding of the capabilities of the NMSA, ARCENT generally has not used NMSA procurement authority to exchange logistic support, supplies, and services;[50] to transfer support to our allies during exercises; or to obtain logistic support under emergency conditions when in the field. ARCENT has used the NMSA in the procurement of long-term storage, port handling and inland transportation, exercise transportation needs, exercise base housing and services, billeting, and medical services. ARCENT contracting officials generally proceed to procure under NMSA authority in a manner similar to procuring under the FAR. Requirements are identified; the procurement agreement is negotiated; prices, quantities, and deliveries are negotiated; the procurement document is given a legal review; delivery is taken; and other procurement administration occurs.

ARCENT has routinely used contracting officers as its NMSA negotiators and document signers. USCENTCOM requires that contracting officers conduct NMSA acquisitions in excess of $25,000. Although officers in the rank of 05 and above and civilian personnel in the grade of GS/GM-14 and above can conduct acquisitions equal to or less than $25,000,[51] ARCENT has not yet exercised this authority. Contracting officers are used because they possess procurement expertise and understand the nuances of the procurement process well enough to translate what they are familiar with—the FAR procurement process—into an area about which they are much less familiar—procurements under NMSA authority.

One recurring and important difficulty that ARCENT and USCENTCOM contracting officials have encountered in procurement is the impossibility of obtaining good price data and, consequently, in developing good price analyses. First, the contracting officials do not have the resources that are available stateside. It is very rare that a contracting official negotiating a NMSA procurement has access to an accountant or any other price analyst. This means that the contracting official is on his own in preparing the price analysis. Second, the countries with which we deal often do not possess the same level of price rationale and price backup documents that companies in the United States routinely possess. The countries in the USCENTCOM area of responsibility have a much more casual attitude to establishing their prices. Both government officials and private contractors often simply pull their prices out of the air. The prices are much more influenced by what the seller thinks the buyer is willing to pay than what is the cost plus profit of the supply or service. Obtaining the documents, statistics, and facts necessary to perform an accurate price analysis, therefore, is very difficult. Third, ARCENT procurement officials are on TDY when negotiating any procurement and have an extremely heavy workload. All of these factors, therefore, often make it impossible to perform a detailed price analysis.

ARCENT procurement officials are still trailblazing with regard to procurement under the authority of the NMSA. Each procurement is unique and ARCENT officials have repeatedly been confronted with issues of first impression. ARCENT hopes to develop model/umbrella acquisition agreement documents and implementing arrangements so that future procurements will be more routine. The goal is to eliminate the time-consuming process of negotiation of procurement arrangement language, so that the contracting officials can concentrate on negotiating requirements, price, and delivery.

Conclusion

The NMSA, as amended by the NDAA87, has greatly increased the flexibility of contracting officers in meeting the variable contracting situations faced in the USCENTCOM area of responsibility. Although its application in the area of responsibility has raised numerous questions, its existence is a positive factor in the complex and confusing world of contracting in the Southwest Asia.

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[50] 10 U.S.C. § 2342(a) (1988).

[51] USCENTCOM Reg. 700-1, para. 6c.

A Practitioner's Guide to "Confidential Commercial and Financial Information" and the Freedom of Information Act

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Introduction

The Freedom of Information Act (FOIA)[1] promotes open government through the disclosure of information in the hands of government officials.[2] Not all information must be disclosed, however. By virtue of exemption 4, the FOIA does not apply "where the disclosure of such information is likely to ... disclose trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[3] The scope of this phrase has received significant judicial examination, the bulk of which has been performed by the United States Court of Appeals and the District Court in the District of Columbia.[4] This article surveys the developments in the law in this area and provides practical advice for the FOIA legal advisor.

A lawsuit implicating exemption 4 typically arises in one of two ways: 1) a requester has been denied access to information and files suit in a United States district court to *compel* disclosure by a federal agency;[5] or 2) a submitter of information files suit to *block* agency disclosure (a reverse FOIA action).[6]

The Reverse FOIA Suit

In *Chrysler Corporation v. Brown*[7] the Supreme Court explicitly recognized the right of submitters of information to prevent disclosure by the Federal Government. This right was not found in the FOIA itself,[8] but was derived from section 10(a) of the Administrative Procedure Act (APA),[9] which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action ... is entitled to judicial review thereof."[10]

The procedure for enjoining agency disclosure has been expanded by Presidential decree. In Executive Order 12,600, Predisclosure Notification Procedures for Confidential Commercial Information, President Reagan established a framework "to improve the internal management of the Federal Government."[11] Among other things, the order requires executive departments and

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[1] 5 U.S.C. § 552 (1982 & Supp. V 1987).

[2] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967).

[3] 5 U.S.C. § 552b(c)(4) (1982).

[4] Using the search request "FOIA or Freedom Information Act and Exemption 4," in LEXIS on 17 May 1989, the author found 188 cases. Of these, 106 cases (including 47 at the appellate level) were decided by the district and appellate courts in the United States District of Columbia Circuit. Next in line was the Fourth Circuit (26 cases, including seven appellate), followed by the Eleventh (12 cases, including five appellate), the Fifth (10 cases, including five appellate) (although some cases are reported in both the 11th and the 5th), and the First Circuit (10 cases, including four appellate).

[5] 5 U.S.C. § 552(a)(4)(B) (1982).

[6] *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

[7] *Id.*

[8] *Id.* at 317-18. Nor was a cause of action found within the Trade Secrets Act (18 U.S.C. § 1905) (1982 & Supp. V 1987). *Id.* at 316. Section 1905 states:

> Whoever, being an officer or employee of the United States or any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. § 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, process, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

[9] *Chrysler*, 441 U.S. at 316.

[10] 5 U.S.C. § 702 (1982).

[11] Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (1987).

agencies to provide the following to a submitter of confidential commercial information: 1) notice of a request for release of information; 2) an opportunity to submit an objection to release to the agency; and 3) written notice from the agency of any final administrative disclosure determination in advance of the specified disclosure.[12] This allows the submitter to file suit to prevent release.

The nature of judicial review in a reverse FOIA suit is not the same as that in a standard FOIA suit. Although there is *de novo* review in a standard FOIA suit,[13] the review in a reverse FOIA suit is derived from the APA and is limited to a review of the administrative record. As explained by the United States Court of Appeals for the District of Columbia in *National Organization of Women v. Social Security Administration*, "The 'focal point for judicial review ... should be the administrative record already in existence, and not some new record made initially in the reviewing court.'"[14] Only when an agency's procedures are "severely defective" will *de novo* review be appropriate.[15]

In light of this limited review, an agency should ensure that the administrative record is as complete as possible. The agency should advise submitters during the predisclosure notification process to make their objections as complete as possible.[16] Not only does this satisfy due process, but it also leads to a more defensible government position because it permits the deciding official to consider fully the submitter's concerns.

Exemption 4

Exemption 4 to the FOIA seeks to protect the interests of both the government and the individual. In order to make intelligent and well-informed decisions, the government may have a need for access to commercial and financial information of an individual. Exemption 4 seeks to encourage individuals to voluntarily submit information to the government by protecting information that is provided in confidence.[17] In addition, exemption 4 seeks to protect persons who must submit financial or commercial information to the government from the competitive disadvantages that would result from the disclosure of that information. There are two independent prongs to exemption 4. Prong one encompasses trade

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[12] *Id.*

[13] 5 U.S.C. § 552(a)(4)(B) (1982).

[14] 736 F.2d 727, 745 (D.C. Cir. 1984) (per curiam) (Mikva, J., concurring) (quoting Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam)).

[15] *Id.* at 745-46.

[16] For example, the following letter, tailored to the particular circumstances, is used by the United States Army Information Systems Selection & Acquisition Agency (USA ISSAA) in the predisclosure notification process:

> The Army has received a Freedom of Information Act (FOIA) request (enclosure 1). Our review of the materials requested reveals that certain data supplied by your company may fall within exemption 4 to the FOIA.
>
> Under this exemption the Army may refuse to disclose trade secrets and commercial or financial information obtained from a source outside the Government which is privileged or confidential. Commercial or financial information is considered confidential if its disclosure is likely to either impair the Government's ability to obtain the necessary information in the future or cause substantial competitive harm to the source of the information.
>
> In order for us to make a determination regarding the release of the materials under consideration, the Army must have a detailed description of the specific information your firm believes should be exempt from disclosure. The information you believe should not be released must be highlighted, not blocked out, so that it may be considered in context with other information to be released. We must also have a detailed justification of the reasons your company believes the information requested should not be released under exemption 4. We believe that you are in the best position to explain the commercial sensitivity of the information requested.
>
> In this regard, please provide us with a specific description of exactly how disclosure of [identify the items] would cause substantial harm to the present or future competitive position of your business. Among other factors, you may wish to consider the following:
>
> 1. The general custom or usage in your business regarding the release of this type of information.
>
> 2. The steps taken to ensure the confidentiality of the information.
>
> 3. The number and position of persons with past or present access to this information, and
>
> 4. For each [page, paragraph, clause, section] describe the type and degree of commercial harm disclosure would cause, and the length of time confidential treatment is warranted.
>
> 5. For unit prices, please discuss factors similar to those in *Acumenics Research & Technology v. Dept. of Justice*, 843 F.2d 800 (4th Cir. 1988).
>
> Due to the time limits imposed by the statute, we require a response within [generally 10] days from receipt of this letter. If we have not heard from you by then, we will assume there is no objection, and we will release all the information requested.
>
> We will carefully consider the justification you provide us and will endeavor to protect your proprietary data to the extent permitted by law. Should we disagree with your position regarding some or all of the information requested, and determine it to be releasable, we will provide you with advance notice of our decision so that you may take whatever steps you consider appropriate to protect your interests.
>
> Please refer any questions regarding this FOIA request to [name and address of Action Officer].

ISSAA FOIA Procedures, para. 7-2b, Request for Submitter's Opinion, July 1989.

[17] *See, e.g.*, National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 769 (D.C. Cir. 1974).

secrets.[18] Prong two consists of the following three components:

— the information must be commercial or financial,
— the information must be obtained from a person, and
— the information must be privileged or confidential.[19]

Most of the dispute in this arena concerns whether commercial information that was obtained from a person is privileged or confidential. This is the focus of the remainder of this article.

In *National Parks & Conservation Association v. Morton*[20] (*National Parks I*) the D.C. Circuit Court of Appeals set forth the standard for review in defining "confidential commercial information":

> [C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[21]

Public Availability

The first step in deciding whether release of commercial information is likely to cause substantial harm to the competitive position of the submitter is to determine whether the information is already in the public domain. As the Court of Appeals in *National Parks & Conservation Association v. Kleppe*[22] (*National Parks II*) observed: "[I]f a party claiming the exemption has customarily disclosed similar information to the public, it may be hard pressed to justify a subsequent claim of confidentiality."[23]

For example, this would include information found in public filings with the Securities and Exchange Commission[24] as well as information readily available to a stockholder. Similarly, the District Court for the District of Columbia Circuit recently found that "*company proprietary information*" consisting of "general information about ... corporate and management structures, financial and production capabilities, corporate history, and employees"[25] of a publicly held corporation was publicly available and had to be disclosed. The court found further that a relationship between the release of this information and the likelihood of harm to the competitive position of the submitter had not been shown.[26] The court opined: "Unlike the release of technical information, for example, the relationship between a competitor's discovery of [the submitter's] corporate structure and that competitor's success in bids for future government contracts or success in the industry generally is far from clear."[27]

Furthermore, information that has been published in the news media is publicly available.[28] Nevertheless, allegations of misconduct published in the media do not, in and of themselves, make public the underlying documents containing commercial information.[29] Thus, in *Occidental Petroleum Corporation v. Securities & Exchange Commission* the Securities and Exchange Commission (SEC) was criticized for suggesting "that publication of an allegation renders public, and subject to release on that ground alone, all information obtained in the course of the ensuing investigation."[30]

In this case the court also declared that the motivation of a submitter to prevent disclosure of commercial information is irrelevant: "Occidental's right to an

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[18] In Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280 (D.C. Cir. 1983), the term "trade secret" was defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Id.* at 1288.

[19] 5 U.S.C. § 552(b)(4) (1982).

[20] 498 F.2d 765 (D.C. Cir. 1974).

[21] *Id.* at 770 (footnote omitted).

[22] 547 F.2d 673 (D.C. Cir. 1976).

[23] *Id.* at 678 n.16.

[24] *See, e.g.*, Occidental Petroleum Corp. v. Securities & Exchange Comm'n., 873 F.2d 325 (D.C. Cir. 1989).

[25] SMS Data Prods. Group, Inc. v. United States Dep't of the Air Force, No. 88-0481-LFO, slip op. at 4 (D.D.C. Mar. 3, 1989).

[26] *Id.*

[27] *Id.*

[28] Unresolved is whether an inadvertent disclosure would preclude later denials of access to the same information.

[29] *Occidental*, 873 F.2d at 341.

[30] *Id.*

exemption, if any, depends upon the competitive significance of whatever information may be contained in the documents ...."[31] More important is the court's discussion concerning the burden of proving public availability. While the proponent of nondisclosure bears the overall *burden of persuasion* that documents are confidential,[32] the proponent of disclosure bears the *burden of production* that information is in the public domain. In the words of the court:

> [A] reverse-FOIA claimant should not be called upon to prove public non-availability; [this would require it] to identify all of the public sources in which the information contained in its documents is not reproduced. To state that task is to see that it is bootless. It is far more efficient, and obviously fairer to place the burden of production on the party who claims that the information is publicly available.[33]

Thus, when the government seeks to disclose commercial information on the grounds that it is no longer confidential as a result of public availability, the government bears the burden of producing evidence that the commercial information is already in the public domain.

Substantial Competitive Harm

In determining whether release of commercial information is likely to cause substantial competitive harm to a submitter, the submitter must prove that he or she actually faces competition and that substantial competitive injury would likely result from disclosure.[34]

Actual Competition

In *National Parks I* the FOIA requester suggested that the submitters, concessionaires in public parks, could not suffer injury to their competitive position in the event of the release of commercial information because they had no competition.[35] Although the court noted that this argument was "very compelling," the court remanded to provide the submitter an opportunity to develop a fuller record in the district court.[36] On remand actual competition was found.[37]

One case has followed up on this approach. In *Hercules, Inc. v. Marsh*[38] the government contractor who was the submitter of information, Hercules, sought to prevent the release of a telephone directory at the Radford Army Ammunition Plant. This directory contained not only the names and telephone numbers of contractor personnel working at the plant, but also evidence of the contractor's organizational structure at the facility, company policies, and specific functions and job classifications of contractor employees.[39] The district court rejected the submitter's allegation that release of this information would cause substantial harm. Although Hercules had "identified several ways in which release would affect its production," Hercules could not show that it faced competition:

> The contract at RAAP is not awarded competitively. Rather, the Army always awards the contract to Hercules. For this reason, Hercules is not competitive within the industry. Therefore, release of the information cannot cause competitive harm. As such the directory is not confidential information under 18 U.S.C. § 1905 nor 5 U.S.C. § 552(b)(4).[40]

This decision could have a far-reaching effect. Carried to its logical conclusion, it could cause the release of commercial information found in government contract files that pertains to awardees of sole-source contracts whenever the contractor cannot show that he faces competition in either the government or commercial marketplace.[41]

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[31] *Id.*

[32] *Id.* at 342. The court found the SEC to have misconstrued the discussion in CNA Financial Corp. v. Sullivan, 830 F.2d 1132 (D.C. Cir. 1987), concerning the burden to prove or disprove public availability. This case is more important for its discussion concerning the Trade Secrets Act, 18 U.S.C. § 1905 (1982). *See infra* text accompanying notes 53-54.

[33] *Occidental*, 873 F.2d at 342 (footnote omitted).

[34] National Parks Conservation Ass'n v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976).

[35] *National Parks I*, 498 F.2d at 770-71. The requester argued that the concessionaires were protected from competition during the life of the contract and enjoyed a statutory preference over other bidders when the contracts were renewed. The court cited 16 U.S.C. § 20d (1982) as authority for "a preference in favor of renewal of contracts or permits held by concessionaires who have satisfactorily performed their obligations under prior contracts or permits." *Id.* at 770 n.20.

[36] *Id.* at 771.

[37] The court of appeals found the district court to have concluded

> that there is competition respecting the renewal of concession agreements as well as competition for the tourist dollar. There is competition between concessionaires within parks, and there is competition between concessionaires and businesses located nearby the parks, by which visitors must pass on the way to the parks. In addition, there is competition within the parks between the concessionaires and businesses operating on privately owned land within the parks.

Id. at 682-83.

[38] Hercules, Inc. v. Marsh, 659 F. Supp. 849 (W.D. Va. 1987), *aff'd*, 839 F.2d 1027 (4th Cir. 1988).

[39] *Id.* at 853. The requester agreed to the deletion of home telephone numbers pursuant to Exemption 6 (invasion of personal privacy). *Id.* at 851.

[40] *Id.* at 854-55. On appeal the Fourth Circuit agreed: "Since Hercules' contract is not awarded competitively, the prospect of competitive injury is remote." 839 F.2d at 1030.

[41] *See National Parks II*, 547 F.2d at 653.

Substantial Competitive Injury

For ease of discussion, competitive injury will be examined according to the type of confidential commercial information that is involved in a government procurement. This section is organized into three subsections: technical, cost, and management information. This structure should be familiar to attorneys who review awards of competitive proposals (negotiated procurement).

Technical Information

In many government procurements, the contract award is not made to the lowest responsive, responsible offeror, but to "the responsible contractor whose offer is most advantageous to the Government, price and other factors considered."[42] These factors and their relative weights are disclosed to potential offerors in section M of the solicitation. Technical merit, price or cost (including cost realism), and management capabilities are typical evaluation factors.

Technical information that is already available in the commercial marketplace cannot be withheld under the FOIA.[43] Thus, technical brochures and literature that accompany proposals in response to solicitation are generally releasable. This section actually concerns technical information that a company seeks to keep secret so as to maintain a competitive advantage.

In *SMS Data Products Group, Inc. v. United States Department of the Air Force*[44] a disappointed "bidder" for an Air Force laptop computer contract sought to obtain a copy of the winning proposal. The proposal was released with certain information redacted. Among the five categories of redacted information were categories for *currently unannounced and future products* and for *proprietary technical information.*[45] The court accepted the evidence presented that release of this information could cause the submitter competitive harm:

> Release of information about currently *unannounced* and *future products* could allow competitors to design similar products earlier than they might otherwise. In addition, [premature] release of such information ... could dramatically *limit* the *sales* of products already on the market, jeopardizing the company's recoupment of design, engineering, manufacturing, inventory, and marketing costs for these previously announced products. ... Release of *proprietary technical information* "would seriously undermine a company's competitive advantage by allowing competitors to have access to *ideas* and *design details* that they would not have had or would have had to spend considerable funds to develop on their own.[46]

Government contractors often argue that the Trade Secrets Act,[47] by itself or in conjunction with the expansive definition of a trade secret found in § 757 of the Restatement of Torts,[48] prohibits the disclosure of commercial information. Under either approach, just about anything of some commercial value would qualify as a trade secret. These contentions, however, have been rejected by the District of Columbia Court of Appeals in two decisions.

In *Public Citizen Health Research Group v. Food & Drug Administration*,[49] an opinion in which then Circuit Judge Antonin Scalia concurred, the court repudiated the definition found in the Restatement and narrowed the definition of a trade secret for the purposes of the FOIA:

> Accordingly, we define *trade secret*, solely for the purpose of FOIA Exemption 4, as a secret commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.[50]

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[42] Lecture by MAJ Earle Munns on "Contract Methods, Negotiations" to the 114th Contract Attorneys Course at The Judge Advocate General's School, U.S. Army (Feb. 24, 1988).

[43] *See supra* text accompanying notes 23-33.

[44] No. 88-0481-LFO, slip op. at 1 (D.D.C. Mar. 31, 1989). The plaintiff also sought copies of the technical scoring and ranking of its proposal by the Air Force as well as copies of the cost scoring and ranking of its proposal. The cost information was provided to the plaintiff during litigation. *Id.* at 3. The court accepted the government's contention that a technical ranking of proposals did not exist. *Id.* at 2-3. Finally, the court found that the technical scoring of its proposal by the Source Selection Evaluation Board for use by the Source Selection Advisory Council was properly withheld pursuant to Exemption 5 under the deliberative process privilege. *Id.* at 1.

[45] *Id.* at 4. The remaining categories of redacted information consisted of company proprietary information, pricing strategy, and subcontractor information. The application of Exemption 4 to these categories is discussed in the text accompanying notes 70-75 *infra*.

[46] *Id.* (emphasis added) (citations omitted).

[47] 18 U.S.C. § 1905 (1982).

[48] A trade secret is defined in section 757, comment (b), of the Restatement of Torts (1939):

> A trade secret may consist of any formula, pattern device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

[49] 704 F.2d 1280 (D.C. Cir. 1983).

[50] *Id.* at 1288.

To hold otherwise and accept the definition found in the Restatement would "render meaningless the second prong of Exemption 4."[51] Because the FOIA proscribes governmental action, this limited definition does not apply to commercial disputes among private parties.

After an extensive and exhaustive analysis, the court in the second decision, *CNA Financial Corporation v. Donovan*,[52] held that the Trade Secrets Act did not qualify as a withholding statute under exemption 3 and that the scope of the Trade Secrets Act was at least coextensive with that of exemption 4 of the FOIA.[53] Thus, if information is within the scope of exemption 4, not only may it not be released, but it is also protected by the Trade Secrets Act. Release of the information would subject the officer authorizing release to the criminal penalties of the Act.[54]

Cost Information

The Federal Acquisition Regulation (FAR) provides for post-award notice to an unsuccessful offeror of the name and address of each offeror receiving an award and the items, quantities, and unit prices of each award.[55]

In the case of *Acumenics Research & Technology v. United States Department of Justice*[56] the Fourth Circuit Court of Appeals interpreted this provision to require the disclosure of the unit prices submitted by the winning offeror. Under the fixed price contract, Acumenics provided litigation support services at a specified unit price, e.g., document coding at $.xx per page.[57] Thus, the unit price was a function of the direct cost (for labor), the production rate[58] of the labor, and the profit multiplier:

Unit price = Direct cost (Labor) x Production Rate x Multiplier

The multiplier, in turn, was the product of overhead, general and administrative costs (G&A), and profit:

Multiplier = Overhead x G&A x Profit

The decision in *Acumenics* focused on whether the commercial information in question was "privileged or confidential." The plaintiff, Acumenics, argued the second prong of the test,[59] namely, that release of the commercial information was likely to cause substantial harm to its competitive position. Acumenics asserted that release of unit price information would reveal its profit multiplier as well as its pricing strategy.

Acumenics further argued that the direct cost for labor and the production rate were "virtually standardized" throughout the industry. Thus, knowledge of the unit price charged would enable a competitor to determine Acumenics' multiplier. By assigning arbitrary values to overhead and G&A, a competitor could then get a "general picture" of how profit was allocated.[60]

Applying "common sense," the circuit court rejected this argument and concluded that "there [were] too many

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[51] *Id.* at 1289.

[52] 830 F.2d 1132 (D.C. Cir. 1987).

[53] *Id.* at 1141.

> If the range of the [Trade Secrets] Act is narrower that the scope of Exemption 4, there will be some commercial and financial data that these agencies will be free to release in their discretion, though they are not required to do so by FOIA. If, on the other hand, the reach of the Act is at least coextensive with that of Exemption 4, a finding that requested material falls within the exemption will be tantamount to a determination that these agencies can not reveal it.

Id. at 1144. The court stated that this conclusion would follow when a federal agency does not have a public access regulation that qualifies as a legal authorization for a disclosure otherwise prohibited by the Trade Secrets Act. *Id.* The court also made reference to and found support in a decision by the Seventh Circuit Court of Appeals:

> In *General Electric Co. v. United States Nuclear Regulatory Comm'n*, ... the court states rather broadly that 'the Trade Secrets Act has no independent force in cases where the Freedom of Information Act is involved,' and that if the requested document 'is not protected by exemption 4, even more clearly it is not protected by section 1905 either.' We understand the precise holding in *General Electric*, however, only to mean that the Trade Secrets Act is not more extensive than Exemption 4, a proposition not inconsistent with so much as we decide today.

Id. at 1151 n.138.

[54] A FOIA officer's concern over the applicability of the Act is justified. The Act provides for substantial criminal penalties in the event "confidential information" is released without authorization. These penalties include a fine not to exceed $1,000, imprisonment not to exceed one year, and removal from office or employment. *See supra* note 8.

[55] 48 C.F.R. § 15.1001(c)(1)(iii) & (iv) (1988). Similarly, the opening of a sealed bid at bid opening would release the same information. *See* 48 C.F.R. 14.402 (1988).

[56] 843 F.2d 800 (4th Cir. 1988).

[57] *Id.* at 802.

[58] Acumenics attempted to argue that, even for tasks calculated as a unit of production, the direct labor cost for that unit could be calculated because the rate of production for that task was standard throughout the industry. *Id.* at 807. The court found this claim to be unsupported by any independent evidence and to be contrary to common sense—production rates will vary depending upon the skill and experience level of the employee as well as upon the equipment used. *Id.*

[59] *See supra* text accompanying note 21.

[60] *Acumenics*, 843 F.2d at 807.

variables in the unit price calculation for a competitor to derive accurately Acumenics' multiplier."[61] Thus, Acumenics could not show how substantial harm was likely to result. The decision of the district court to release the unit prices was affirmed.

Because discovery of Acumenics' pricing strategy also rested on a competitor's ability to derive the multiplier, release of unit prices could not result in competitive harm to Acumenics.[62]

The *Acumenics* rationale can easily be extended to apply to supply contracts[63] and cost contracts.[64] When variables in the formula are unknown (e.g., either the direct cost or the production rate), release of the unit price is appropriate.

What happens, however, when the requester asks not for the price, but for the direct costs instead? In *Federal Electric Corporation v. Carlucci*[65] the District of Columbia Court of Appeals found that an incumbent contractor (the plaintiff) suffered no injury as a result of the release of its direct labor and materials costs. After receiving a FOIA request, these costs were released to all the potential offerors on the replacement contract, a contract for base operations and maintenance.[66]

Arising out of a bid protest to the district court, the court of appeals examined documents submitted under seal that evaluated the technical and cost proposals submitted by the offerors in the competitive range, which included the plaintiff. The plaintiff's proposal received the lowest technical evaluation of the four finalists, and its "bid" was "'not even close' to the winning proposal."[67] Moreover, a line item comparison of the plaintiff's proposal to the winning offeror's proposal "revealed no pattern of marginal underbidding" that would indicate that the material was used to the plaintiff's detriment. Because the plaintiff could not show any injury, he was not "prejudiced" by the release of his cost data.[68]

Would discovery of the multiplier really harm an incumbent contractor? What if the cost information is stale? In a footnote to *Acumenics* the court suggests that there would be no harm: "The overhead rate and the G&A rate are not constant and will vary depending on a company's backlog of work. Thus, it cannot be confidently assumed that the same multiplier will be used over a period of time."[69]

Because the multiplier (as well as the overhead and G&A rates) is not constant from contract to contract, one could argue that information would become stale as of contract award, and release of this information would therefore not give away a competitive advantage.

If cost information can become stale, why not technical information?[70] Can it not be said that when a replacement contract is awarded, the technical solution will no longer be valuable? At the very least, a submitter must tell an agency during the predisclosure notification procedures why the information is not stale.

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[61] *Id.*

[62] *Id.* at 808.

[63] *See* Racal-Milgo Gov't Sys., Inc. v. Small Business Admin., 559 F. Supp. 4 (D.D.C. 1981). Although this case predates *Acumenics*, it illustrates the rationale for releasing unit prices in a supply contract. The court in *Racal-Milgo* summarily rejected the argument that the release of unit prices would reveal the contractor's manufacturing costs. This case is also noteworthy for its discussion of pricing strategy. The court observed that an argument that disclosure of unit prices would reveal pricing strategy/structure was "plainly inconsistent" with an argument that disclosure of unit prices would reveal manufacturing costs. *Id.* at 6.

[64] In a cost-type contract, labor rates for varying personnel are often found in section B, "Schedule of Supplies/Services" of the contract document. Typically these rates are "loaded," i.e., the rate not only contains the direct cost that the contractor will pay its employee, but it will also include markups for overhead and general and administrative expenses (G&A). The fact that the labor cost is an estimate of the contractor's actual cost is indistinguishable from a fixed-price contract. The difference in contract form only changes the allocation of degree of risk between the contractor and the government when actual labor costs exceed the cost estimated by the contractor.

[65] 866 F.2d 1530 (D.C. Cir. 1989).

[66] *Id.* at 1532.

[67] *Id.* at 1533.

[68] *Id.*

[69] *Acumenics*, 843 F.2d at 808 n.8.

[70] *But see* Audio Technical Svcs. Ltd. v. Dep't of the Army, 487 F. Supp. 779 (D.D.C. 1979). In a contract to design and install an audio recording system, an unsuccessful offeror sought access to the "design recommendations and identification of prospective problem areas" and "design concepts including methods and procedures" found in the winning offeror's technical proposal. The court concluded that this information contained "technical information with application well beyond the instant bid proposal and reflecting years of technological development" by the winner. *Id.* at 782.

Management Information

"*Company proprietary information*" consisting of *general* information concerning the corporate and management structure of a government contractor as well as its "production capabilities, corporate history, and employees" was ordered released in *SMS Data Products Group*. Against government affidavits, the contractor was unable to show a connection between the release of this information to its competitive position: "[T]he relationship between a competitor's discovery of [the submitter's] corporate structure and the competitor's success in bids for future government contracts or success in the industry generally is far from clear."[71]

It is essential that the government contractor clearly demonstrate: 1) the link between the information (to which it objects to release) and its competitive position; and 2) the effect that release of the information would have. As indicated previously, the contractor should make this demonstration during the predisclosure notification process.[72]

A denial of a FOIA request for a customer list and biographical data of key employees contained in a contractor's bid proposal was upheld in *Audio Technical Services Ltd. v. Department of the Army*.[73] The court accepted the contractor's explanation of how release of this information would cause it substantial competitive harm: "[T]he omitted customer list and data on personnel include information important to [its] competitive position."[74]

One must remember, however, that if this information is otherwise publicly available, it may be releasable. For example, in a support service contract, the government may acquire technical services from a government contractor. In this instance, the government acquires the technical expertise of the contractor. This expertise is found in the contractor's professional staff, which the contractor seeks to protect. Biographical data concerning the corporate staff (e.g., a corporate vice president) as well as the clerical personnel are not so vital. In fact, the identity of corporate personnel may already be in the public domain. Thus, release of biographical information may not cause substantial competitive harm to a firm's competitive position.

The ability of a competitor to construct a customer list through other means is another factor to consider in determining whether release would be likely to cause substantial harm. In *Ivanhoe Citrus Association v. Handley*[75] a FOIA requester sought to acquire a list of citrus growers compiled by the United States Department of Agriculture from information received from citrus handlers (pickers and packers). The court found that "anyone can discover the names and addresses of growers ... by visiting orange groves, and by other obvious means" and concluded that "plainly, the release of the list cannot cause substantial harm."[76]

A contractor's network of available subcontractors was protected from release in *SMS Data Products Group*.[77] The court found that "[c]ompetitors could be substantially benefited by gaining access to these subcontractors without needing to expend the same time and resources."[78] Again, a submitter's ability to demonstrate competitive harm that could result from release compelled protection of the information.

Conclusion

Case law interpreting the Freedom of Information Act continues to evolve. Courts appear to be more likely to examine critically the government's actions. Thus, government FOIA advisors must ensure that predisclosure notification procedures are used. This completes the administrative record and allows for the full development of the facts necessary to demonstrate the presence or absence of substantial competitive harm.

Furthermore, FOIA advisors should counsel action officers to take advantage of the opportunity to narrow the scope of FOIA requests received through negotiations with requesters. By narrowing the request to identify the information that the requester really wants, a substantial savings in time and effort may be realized. This, in turn, reduces the overall cost to the government in processing the request. Any such negotiations should be memorialized in writing and confirmed by correspondence.

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[71] *SMS Data Products Group*, No. 88-0481-LFO, slip op. at 4 (D.D.C. Mar. 31, 1989).

[72] *See supra* note 16 and accompanying text.

[73] 487 F. Supp. 779.

[74] *Id.* at 782.

[75] 612 F. Supp. 1560 (D.D.C. 1980). Similarly, the District of Columbia Circuit Court of Appeals has indicated that the ability to conduct private testing and the cost to do so are additional factors to consider in determining whether the information is publicly available. Worthington Compressors, Inc. v. Costle, 213 U.S. App. D.C. 200 (1981), *supplemental opinion sub nom.* Worthington Compressors, Inc. v. Gorsuch, 668 F.2d 1371 (1981). To the extent that a submitter can show that private testing and reverse engineering is commercially impracticable, a claim of harm to its competitive position has merit. *Id.*

[76] *Ivanhoe Citrus Ass'n*, 612 F. Supp. at 1566.

[77] No. 88-0481-LFO, slip op. at 4 (D.D.C. Mar. 31, 1989).

[78] *Id.*

Memorandum of Law—Review of Weapons in the Advanced Combat Rifle Program

Department of Defense Instruction 5500.15 requires a legal review of any weapon system intended to meet a military requirement of the United States. The purpose of the review is to ensure that the weapon system's intended use in combat is consistent with the law of war obligations of the United States. The Joint Services Small Arms Program is evaluating four weapon systems to identify technologies for possible inclusion in an Individual Combat Weapon program. The following opinion by the International Affairs Division of the Office of The Judge Advocate General evaluates the weapons systems, discusses the concepts of military necessity and unnecessary suffering as they apply to small arms development in a modern environment, and concludes that each of the weapons systems under evaluation and their respective projectiles is consistent with the law of war obligations of the United States.

DAJA-IA (27-1a) 21 May 1990

MEMORANDUM FOR HEADQUARTERS,
U.S. ARMY ARMAMENT, MUNITIONS
AND CHEMICAL COMMAND

SUBJECT: Advanced Combat Rifle; Request for Legal Review

1. References.

a. Department of Defense Instruction 5500.15, Subj: Review of Legality of Weapons Under International Law (16 Oct. 1974).

b. Army Regulation 27-53, Subj: Review of Legality of Weapons Under International Law (1 Jan. 1979).

c. HQUSAMC ltr ANSMC-GCP (D) dated 20 March 1990, with enclosures.

2. Reference a. requires a legal review for any weapon or weapon system intended to meet a military requirement of the United States in order to ensure that its intended use in armed conflict is consistent with the law of war obligations of the United States. Reference b. states that this requirement applies to the development or procurement of all weapons or weapons systems intended for use in combat by the Army, and directs reviews at appropriate stages in the development and/or acquisition of weapons. Accordingly, reference c. requested a compliance review for the weapons under evaluation in the Advanced Combat Rifle (ACR) Program.

3. This review is not intended to, does not, and should not be construed as reaching any conclusions as to the merits of one Advanced Combat Rifle system as compared to another, or the merits of any of the technologies under consideration *vis-a-vis* the present service rifle.

4. The ACR Program. This program is investigating technologies to improve the soldier's combat performance. Most targets are covered or obscured, move unpredictably, and as a consequence are exposed to hostile fire for limited periods of time. When coupled with the level of marksmanship training provided the average soldier and the stress of combat, a soldier's aiming errors are large and hit probability is correspondingly low. While the current M16A2 rifle is capable of acceptable accuracy out to six hundred meters, the probability of an average soldier hitting an enemy at three hundred meters is ten per cent. The goal of the ACR program is to demonstrate the potential of a one hundred per cent increase in hit probability. The ACR Program is an effort to identify technologies worth inclusion in an Advanced Combat Weapons program.

5. Of the four weapons systems under evaluation in the ACR Program, two fire conventional jacketed bullets, while two fire one-piece steel flechettes or dart-like projectiles. Each of the systems is described below.

a. Heckler and Koch is a caseless system that fires a 4.92mm guilding metal clad steel jacketed lead core bullet weighing 49.2 grains at a muzzle velocity of 3,000 feet per second. The weapon operates in three modes: single shot, three-round salvo bursts (at a rate of 2,000 rounds per minute), or automatic fire at a rate of 450 rounds per minute.

b. Colt is a derivative of the current M16A2 rifle, firing duplex ammunition which consists of a brass-cased cartridge containing two bullets. Each is a 5.56mm conventional guilding metal jacketed steel core bullet. The front bullet weighs 35 grains; the rear bullet, 33 grains, each fired at 2,900 feet per second. The front bullet travels to the aim point while the rear bullet is offset to a controlled dispersion to increase hit probability. The weapon operates in single shot and automatic fire modes, the latter at a rate of 850 rounds per minute.

c. AAI is a brass-cased system that fires a one-piece steel flechette projectile 1.5mm in diameter, 42mm long, weighing 10.2 grains, at a velocity of 4,600 feet per second. The weapon operates in single shot and three-round salvo burst modes, the latter at a rate of 1,700 rounds per minute.

d. Steyr-Mannlicher is a plastic-cased system that fires a one-piece steel flechette projectile 1.5mm in diameter, 42mm in length, weighing 10.2 grains, at a velocity of 4,900 feet per second. The weapon operates in single shot and three-round burst modes, the latter at a rate of 1,200 rounds per minute.

e. In contrast, the M16A2 M855 bullet is a 5.56x45mm guilding metal jacket, lead core with steel penetrator in forward portion of bullet projectile weighing 62 grains fired at a muzzle velocity of 3,050 feet per second; the NATO M80x51mm bullet is a 7.62 guilding metal or guilding-metal clad steel jacket, lead core bullet weighing 150 grains fired at a muzzle velocity of 2,868 feet per second; the Soviet AK-47 utilizes a 7.62x39mm guilding-metal clad steel jacket, lead core, bullet weighing 120 grains fired at a muzzle velocity of 2,350 feet per second, while the Soviet AK-74 is a 5.45x39mm guilding-metal clad steel jacket, steel core with lead in forward portion of bullet projectile, weighing 53 grains and fired at a muzzle velocity of 2,920 feet per second.

6. Legal factors. The principal provision relating to the legality of weapons is contained in article 23e of the Annex to Hague Convention IV Respecting the Laws and Customs of War on Land of 18 October 1907, which prohibits the employment of "arms, projectiles, or material of a nature to cause superfluous injury." In some law of war treatises, the term "unnecessary suffering" is used rather than "superfluous injury." The terms are regarded as synonymous. To emphasize this, article 35, paragraph 2 of the 1977 Protocol I Additional to the Geneva Conventions of August 12, 1949, states in part that "It is prohibited to employ weapons [and] projectiles...of a nature to cause superfluous injury or unnecessary suffering." Although the United States has made the formal decision that it will not become a party to Protocol I, U.S. officials have stated that the language of article 35(2) of Protocol I as quoted is a codification of customary international law, and therefore binding upon all nations.

The terms "unnecessary suffering" and "superfluous injury" have not been formally defined within international law. In determining whether a weapon or projectile causes unnecessary suffering, a balancing test is applied between the force dictated by military necessity to achieve a legitimate objective, in this case an increased probability of hitting an enemy soldier at ranges out to 300 meters, and his or her incapacitation, *vis-a-vis* suffering that may be considered superfluous to that intended objective. The test is not easily applied; a weapon that can incapacitate or wound lethally at 300 meters or longer ranges may result in a greater degree of incapacitation, or greater lethality, at lesser ranges. This is not new, but has been the case with all small arms projectiles throughout the history of modern warfare. For this reason, the degree of "superfluous" injury must be disproportionate to the intended objectives for development of the weapon, that is, it must outweigh substantially the military necessity for the weapon system or its projectile.

The fact that a weapon causes suffering does not lead to the conclusion that the weapon causes "unnecessary suffering," or is illegal *per se*. Military necessity dictates that weapons of war lead to death, injury, and destruction; the act of combatants killing or wounding enemy combatants in combat is a legitimate act under the law of war. In this regard, there is an incongruity in the law of war in that while it is legally permissible to kill an enemy combatant, incapacitation must not result inevitably in unnecessary suffering. What is prohibited is the design (or modification) and employment of a weapon for the purpose of increasing or causing suffering beyond that required by military necessity. In conducting the balancing test necessary to determine a weapon's legality, the effects of a weapon cannot be viewed in isolation. They must be examined against comparable weapons in use on the modern battlefield, and the military necessity for the weapon under consideration.

There are other treaties potentially germane to this review. The Hague Declaration Concerning Expanding Bullets of 29 July 1899 prohibits the use in international armed conflict

> ... of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

The United States is not a party to this treaty, but U.S. officials over the years have taken the position that the armed forces of the United States will adhere to the terms of this convention to the extent that its application is consistent with the object and purpose of article 23e of the Annex to 1907 Hague Convention IV.

There are distinctions. In 1985 The Judge Advocate General of the Army, in an opinion coordinated with the Judge Advocate Generals of the Navy and Air Force, determined that the prohibition contained in the 1899 Hague Declaration was inapplicable to domestic law enforcement and to U.S. military operations to combat terrorism, inasmuch as common criminals and terrorists are not protected by the law of war. Moreover, the military necessity for employment of expanding ammunition during a counterterrorist mission—to immediately incapacitate a terrorist while simultaneously limiting overpenetration that might endanger innocent hostages—substantially outweighed the suffering a terrorist might experience, even if terrorists were protected by the law of war.

Wound ballistic research over the past fifteen years has determined that the prohibition contained in the 1899 Hague Declaration is of minimal to no value, inasmuch as virtually all jacketed military bullets employed since 1899 with pointed ogival "spitzer" tip shape have a tendency to fragment on impact with soft tissue, harder

organs, bone, or the clothing and/or equipment worn by the individual soldier.[1]

Whether a bullet fragments or not also is dependent upon bullet jacket thickness. For example, the 7.62mm ammunition manufactured to NATO specifications and used by the military of the Federal Republic of Germany has a substantially greater tendency to fragment in soft tissue than does the U.S. M80 7.62mm ammunition made to the same specifications, because the latter relies upon a bullet jacket that is more than 50% thicker than the former. 7.62mm and 5.56mm ammunition manufactured for and used by the Swedish armed forces has fragmentation characteristics similar to that of the 7.62mm West German NATO-standard ammunition. Tissue disruption by the fragmenting West German 7.62mm and Swedish 7.62mm and 5.56mm bullets is substantially greater than bullets manufactured to military specifications and utilized by the U.S. military during the past quarter century (whether the M80 7.62mm, or M16A1 M193 or M16A2 M885 5.56mm [Fackler, p. 64]).

Although the Colt and Heckler & Koch rounds are fired at velocities roughly equivalent to that of the 5.56mm M855 round, bullet mass and bullet velocity are major factors in determining a bullet's potential. It is improbable that the Colt or Heckler & Koch projectiles, neither of which has a bullet mass greater than the 5.56mm M855, would result in greater tissue disruption than the current M855 bullet utilized in the M16A2.[2] It is highly probable that the Colt and Heckler & Koch bullets will result in substantially less tissue disruption than the thin-jacketed, high-fragmenting West German 7.62mm or Swedish 7.62mm and 5.56mm bullets. As none of the weapons systems under consideration employ projectiles that are likely to produce wounds greater than those caused by existing military small-caliber projectiles, the 1899 Hague Declaration has no further applicability in this review.

Another treaty of potential relevance to this review is the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980 (hereinafter "UNCCW"). The United States signed the UNCCW on 8 April 1982. While the United States is not yet a party to this treaty, the Joint Chiefs of Staff interposed no objection to the U.S. becoming a party to the UNCCW and its Protocol I at the time they consented to U.S. signature of the treaty. Protocol I of the UNCCW prohibits the employment of

> any weapon the primary effect of which is to injure by fragments which in the human body escape detection by x-rays.

The first protocol to the UNCCW is relevant to this review because both the AAI and Steyr-Mannlicher ammunition employ liquid crystal polymers in the sabot that holds the flechette in place. It is not necessary to determine whether liquid crystal polymers are detectable by x-ray, as the sabot in each round is employed for effects other than injury to combatants. (The wounding capability of the sabot is extremely limited, as it separates from the flechette, quickly loses its force, and falls to the ground within one hundred feet of the muzzle.) The negotiation history of the UNCCW Protocol I is clear that its prohibition would not extend to the polymer sabot in the AAI and Steyr ammunition.

7. A myriad of factors enter into the effect a bullet has upon striking its target, to include bullet weight, bullet mass, range, velocity on impact, portion of the body struck (e.g., arm, leg, torso, head), portions affected by the permanent wound cavity (e.g., soft tissue or bone, vital organs, etc.), entry angle into the body, distance traveled point-forward before yawing, degree of bullet yaw on impact, deformation or deflection of the bullet caused by the soldier's equipment prior to the bullet's entry into the body, degree of bullet penetration, tissue disruption, the physical condition of the soldier, number of wounds inflicted, and delay prior to treatment of the wound. Extended discussions of small caliber weapons at the 1978-1980 United Nations conference responsible for preparation of the UNCCW and, concurrently and subse-

[1] The pointed ogival "spitzer" tip, shared by all modern military bullets, reflects the balancing by nations of the criteria of military necessity and unnecessary suffering: its streamlined shape decreases air drag, allowing the bullet to retain velocity better for improved long-range performance; a modern military 7.62mm bullet [with all lead core] will lose only about one-third of its muzzle velocity over 500 yards, while the same weight bullet with a round-nose shape will lose more than one-half of its velocity over the same distance. Yet the pointed ogival "sptizer" tip shape also leads to greater bullet break up, and potentially greater injury to the soldier struck by such a bullet *vis-a-vis* a round-nose [full metal jacketed] bullet. See Dr. M. L. Fackler, "Wounding Patterns for Military Rifle Bullets," *International Defense Review*, January 1989, pp. 59-64, at 63. Weighing the increased performance of the pointed ogival "spitzer" tip bullet against the increased injury its breakup may bring, the nations of the world—through almost a century of practice—have concluded that the need for the former outweighs concern for the latter, and does not result in unnecessary suffering as prohibited by the 1899 Hague Declaration Concerning Expanding Bullets or article 23e of the 1907 Hague Convention IV. The 1899 Hague Declaration Concerning Expanding Bullets remains valid for expression of the principle that a nation may not develop or employ a bullet that expands easily on impact for the purpose of unnecessarily aggravating the wound inflicted upon an enemy soldier. Such a bullet also would be prohibited by article 23e of the 1907 Hague IV, however.

[2] Wound ballistics tests conducted with the H&K bullet in France determined that the H&K bullet does not fragment.

quently, in wound ballistics symposia sponsored by the Government of Sweden, established that specific criteria for determination of the legality of military small caliber projectiles are, at best, subjective and elusive.[3]

Certain conclusions were reached. For example, neither kinetic energy transferred to the target nor velocity alone are adequate criteria for determination of the wounding capabilities or potential of a small arms bullet; tissue disruption rather than the temporary wound cavity is of greater relevance to the lethality or incapacitation of a small-caliber projectile; and the previously-stated fact that most military small-caliber rifle projectiles with pointed ogival "spitzer" tip shape utilized in this century have a tendency to fragment on impact, producing effects that in some cases are only marginally different from those attributed to ammunition with soft or serrated tips by the 1899 Hague Declaration.

From both a legal and medical standpoint, the lethality or incapacitation effects of a particular small-caliber projectile must be measured against comparable projectiles in service. In the military small arms field, "small caliber" generally includes all rifle projectiles up to and including .60 caliber (15mm). For the purposes of this review, however, comparison will be limited to small-caliber rifle ammunition in the range of 5.45mm to 7.62mm, that is, that currently in use in assault rifles by the United States, other NATO nations, and the Soviet Union and its Warsaw Pact allies, as described in paragraph 5e, above.

A complete comparison between the projectiles under consideration and current assault rifle ammunition can best be accomplished through examination of wound profiles produced through firing the projectiles in question into ordnance gellatin. It is understood that tests are being conducted at the Ballistic Research Laboratory (BRL) at Aberdeen Proving Ground using 20% ordnance gellatin for the purpose of quantifying incapacitation effects. A report on the conclusions of those tests is requested; a supplement to this legal review will be published after examination of that report, if it is deemed necessary. It is recommended, but not required, that additional firings be conducted at the U.S. Army's Wound Ballistics Laboratory at Letterman Army Institute of Research, utilizing 10% ordnance gelatin in order to permit wound profile evaluation by a military surgeon experienced in experimental wound production and battlefield wound treatment. This will not only permit a fuller legal evaluation of the weapons systems under consideration, but will facilitate concurrent development of procedures for wound treatment.

8. Other Law of War Factors: Flechettes. Two of the weapon systems under consideration (AAI and Steyr-Mannlicher) employ a flechette projectile. The issue of the legality of flechettes was thoroughly discussed in the course of the multinational conference that produced the UNCCW. The conferees found no basis to suggest that flechettes violated the prohibition on unnecessary suffering contained in article 23e of Hague Convention IV of 1907. No provision was adopted to prohibit or limit the use of flechettes.

In their early years of development and employment, a number of myths emerged regarding flechettes and their incapacitation effect or lethality; for example, it was alleged by some that flechettes were designed to bend on impact with soft tissue solely for the purpose of increasing the suffering imposed on an enemy combatant, and that the wounding effects of flechettes were substantially greater than comparable munitions, whether artillery fragments or assault rifle bullets. Research associated with the UNCCW negotiations did much to clear the air with regard to flechettes. Not all flechettes bend on impact, for example. Even if a flechette is designed to or has a tendency to bend or otherwise deform on impact, this would not necessarily constitute a violation of the prohibition on unnecessary suffering; it would be legally permissible if military necessity requires such a characteristic in order to increase the projectile's incapacitation effect or lethality at its maximum effective range, and is not incorporated into the design merely for the purpose of needlessly aggravating the wounding effect of the projectile.

Flechettes employed in the weapons under consideration apparently do not exceed the lethality or incapacitation effect of contemporary assault rifle projectiles even when those flechettes bend, and in many cases (depending in large measure on range) have lethality or incapacitation effects that are less than contemporary assault rifle projectiles at the same ranges. Subject to information that might be discerned in the course of the wound ballistic testing being conducted by BRL, neither flechette round under consideration can be regarded as contravening the law of war prohibition on unnecessary suffering.

9. Other Law of War Factors: Multiple-Wounding. All of the ACR weapons fire multiple projectiles per trigger pull. The Colt weapon employs the multiple launch technique of firing two bullets per cartridge. The AAI, H&K and Steyr systems utilize the serial launch technique. Each of these weapons fires three rounds in a high rate of fire burst to fire three projectiles per trigger pull. The

[3]The conference that promulgated the UNCCW appointed a special working group on small-caliber ammunition. That working group, and the conference as a whole, declined to restrict small caliber weapons and ammunition beyond the prohibition contained in article 23e of the Annex to the 1907 Hague Convention IV. No small-caliber military weapon or projectile employed during this century was regarded as violating the prohibition on unnecessary suffering contained in article 23e of Hague IV.

purpose of each is to increase the probability of hitting the enemy soldier against whom fire is being directed. There will be occasions in which an enemy combatant will suffer multiple wounds. At issue is whether the employment of weapons that could produce multiple wounds is prohibited by the unnecessary suffering prohibition contained in article 23e of the Annex to the 1907 Hague Convention IV.

The issue was considered in the course of the UNCCW conference. An argument was made by a one delegation (Sweden) that if a soldier can be disabled by a single projectile, then multiple-projectile weapons that might cause a soldier to suffer more than one wound would lead to unnecessary suffering. This argument was specifically directed at certain types of fragmenting munitions, such as the cluster munition and the Claymore mine, but is equally applicable with regard to all of the weapons systems under consideration. The issue became moot when it was pointed out to the delegation from Sweden that its armed services were equipped with the very types of weapons it was condemning.[4]

It was the conclusion of the conferees that the purpose for development of such munitions was to increase the probability of hitting soldiers within range of the weapon rather than increasing the suffering of an individual soldier. The conferees recognized that some soldiers likely will suffer multiple wounds owing to the volume of firepower extant on the modern battlefield. The proposal to place restrictions on fragmenting weapons was not accepted by the participants in the UNCCW conference. Similarly, it is concluded that the fact that some soldiers may suffer multiple wounds in the employment of any of the candidate weapons systems does not violate the prohibition on unnecessary suffering contained in article 23e of the Annex to the 1907 Hague Convention IV.

10. Conclusion. A projectile may be considered in violation of the prohibition contained in article 23e of Annex to the 1907 Hague Convention IV if its wounding effects are substantially greater than those of comparable projectiles in service, and there is no military necessity for the increase in wounding effect other than to increase the suffering of the individual soldier. Subject to any change that may occur as a result of the BRL test results, the following conclusions are reached with regard to the weapon systems under consideration in the U.S. Army Advanced Combat Rifle program:

a. The technologies employed in the weapon systems under consideration are militarily necessary in order to increase the probability of hitting an enemy soldier and achieving a necessary level of incapacitation under a variety of conditions at a variety of ranges out to 600 meters.

b. The information provided for this review does not suggest that the purpose for the design of any of the projectiles under consideration was to increase the suffering of the soldier struck by these projectiles, or that the suffering a soldier is likely to experience would be disproportionate to the military necessity for the design characteristics incorporated into the weapon systems under consideration.

c. None of the weapon systems or technologies will lead to wounds greater than those imposed by comparable (5.45 to 7.62mm) infantry weapons now in use by the nations of the world.

d. Therefore, each of the weapons systems under consideration is consistent with the law of war obligations of the United States.

FOR THE JUDGE ADVOCATE GENERAL:

W. HAYS PARKS
Special Assistant for Law
of War Matters

[4]For example, the Swedish delegation's argument regarding multiple wounding lost credibility with the conferees when it was revealed that FFV Ordnance's 013 is a Swedish copy of the Claymore mine. The FFV 013 is utilized by the Swedish Army and marketed around the world.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Concurrent Jurisdiction and Speedy Trial: When the Government Sits on the NATO SOFA

You are a defense counsel stationed in Germany. A soldier arrives at your office Monday morning and asks to see an attorney; he was in an accident off-post Saturday night and may now be facing criminal charges. The German police are investigating. The soldier has had his pass privileges and driver's license revoked.

The government eventually obtains a release of jurisdiction and the soldier, who is now your client, is arraigned 231 days after restriction was imposed. You move to have the charges dismissed due to lack of speedy trial. The military judge denies your motion.

A similar situation occurred in *Hall v. Thwing*.[1] At trial, defense counsel moved to have the charges of drunk driving resulting in personal injury and fleeing the scene of an accident[2] dismissed for lack of a speedy trial. The military judge found that Private First Class Hall (the petitioner) had been placed on restriction in lieu of arrest on 22 March 1989, four days after the accident.[3] Therefore, the government had to bring him to trial by 20 July 1989, the 120th day of restriction.[4] The petitioner was finally arraigned on 8 November 1989, well after the 120-day period ended.[5]

The case was further complicated by the involvement of the German authorities. In May or June 1989, the government notified German authorities of the case, thereby requiring the German government to assert jurisdiction within twenty-one days should it choose not to release jurisdiction to the United States.[6] On 27 June 1989, the government was given informal notice that the German government would release jurisdiction; written notification was received on 25 August 1989.[7] Charges were preferred against petitioner on 5 September and referred to trial on 11 October 1989.[8] The military judge denied the speedy trial motion, holding that the ninety-seven days it took for the German government to release jurisdiction were excludable from government accountability.[9] On a petition for extraordinary relief in the nature of a writ of mandamus, the Army Court of Military Review granted the extraordinary relief sought by petitioner and ordered the charges and specifications dismissed for lack of a speedy trial.[10]

In most cases, the German decision concerning release of jurisdiction will not delay a court-martial. Generally, the German authorities must be notified promptly of an incident.[11] The German government has twenty-one days from notification of a serious incident within its primary jurisdiction to assert jurisdiction.[12] Thereafter, the German government may not unilaterally reassert jurisdiction, although the U.S. forces may consider such a request.[13] If the system had been working properly in Private First Class Hall's case, the German government would have been notified of the incident in March and a release of jurisdiction would have been obtained well before the 120-day period ended.

The two exceptions to the 120-day rule that were arguably applicable to the situation[14] require causation: the reason for the delay must have actually caused the government to be unable to meet the 120-day rule.[15] That was not the case here; charges were not *preferred* until 5 September 1989—well after the 120 days had expired.

The Army court reversed the military judge's ruling that the government's accountability did not begin until 27 June 1989, when the German government informally released jurisdiction.[16] The Army court also held that the government could not avail itself of any exceptions to the 120-day rule when it had not been diligent in pursuing pretrial matters.[17] In this case, the government failed to investigate the case, prefer charges, or conduct an article 32[18] hearing until 171 days after the incident occurred. The Army court found that the delays were caused by the

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[1] 30 M.J. 583 (A.C.M.R. 1990).

[2] Uniform Code of Military Justice arts. 111 and 134, 10 U.S.C. §§ 911 and 934 (1982) [hereinafter UCMJ].

[3] 30 M.J. at 584.

[4] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707(a) [hereinafter MCM, 1984, and R.C.M., respectively] states: "*In general.* The accused shall be brought to trial within 120 days after the earlier of: (1) notice to the accused of preferral of charges under R.C.M. 308; or (2) the imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) entry on active duty under R.C.M. 204."

[5] 30 M.J. at 584.

[6] *Id.* (citing Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany, *opened for signature* August 3, 1959, art. 19, para. 3, 14 U.S.T. 531, T.I.A.S. No. 5351, at 23 [hereinafter NATO SOFA Supp. Agreement]).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] 30 M.J. at 587.

[11] U.S. Army Europe Reg. 550-50, Foreign Countries: Exercise of Foreign Criminal Jurisdiction Over U.S. Personnel, para. 11a(1) (25 Nov. 1980) [hereinafter USAREUR Reg. 550-50].

[12] NATO SOFA Supp. Agreement, art. 19, paras. 1, 2, 3, 5(b).

[13] *See* Davis, *Waiver and Recall of Primary Concurrent Jurisdiction in Germany*, The Army Lawyer, May 1988, at 30.

[14] R.C.M. 707(c)(6)—"Any period of delay resulting from the absence or unavailability of the accused"; and R.C.M. 707(c)(9)—"Any other period of delay for good cause, including unusual operational requirements and military exigencies."

[15] *Hall*, 30 M.J. at 585.

[16] *Id.*

[17] 30 M.J. at 585-86.

[18] UCMJ art. 32a.

government's inattentiveness rather than German tardiness in releasing jurisdiction.[19]

Even if there is causation, the delay must still be reasonable. The government, through regulations, has established the standard of reasonableness for cases of concurrent jurisdiction with host nations:

> Regardless of whether jurisdiction also may be invoked by a foreign authority, in all cases in which disciplinary action under the Uniform Code of Military Justice is appropriate, US military commanders concerned will ensure that pretrial action (e.g., investigation, preferral of charges, referral of charges to trial, as appropriate) is accomplished expeditiously and is not delayed pending resolution of the jurisdictional issues in the case. For Army or Navy personnel, US authorities will not bring the individual to trial, impose nonjudicial punishment, or make any other final disposition of the case until the approval of the USCR [U.S. Country Representative] to such action has been obtained.[20]

United States Army Europe regulations mandate processing the charges against an accused concurrently with the German consideration of whether to exercise jurisdiction.[21] That did not happen in *Hall v. Thwing*. Therefore, the government was held accountable from the day that restriction was imposed.[22]

As the Army court found no applicable exception to the 120-day rule, it held that the military judge erred to the substantial prejudice of the petitioner by denying his motion. The court held that the petitioner should not be tried by court-martial or await the resolution of this issue on appeal.[23]

Trial defense counsel stationed in Germany should hold the government's feet to the fire concerning release of jurisdiction and speedy trial problems. The government is accountable for the time required to obtain a release of jurisdiction from the German authorities. In some cases the government will not move expeditiously. The government cannot remain idle and do nothing while the German authorities decide what to do. As *Hall v. Thwing* demonstrates, it can be to your client's advantage when the government does just that. Captain Robin K. Neff.

Any Justice to Obstruct?

Three recent cases illustrate a problem with the Manual's definition of obstruction of justice. The problem is whether comments to witnesses can obstruct justice before "justice" knows about the crime. One case suggests "yes"; another clearly says "no"; a third says "maybe." In each case, before officials found out about a crime, the accused told those who knew about it to keep it secret. Convictions for obstruction of justice on this basic fact pattern presented cases of first impression for the military appellate courts.

Language first appearing in the 1984 Manual for Courts-Martial provided the basis for these convictions. The new language lists three key elements for obstruction of justice: 1) that the accused wrongfully did a certain act; 2) that the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending; and 3) that the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice.[24] While use of the word "case" in the second element suggests a requirement that the crime have gained some official cognition before the "wrongful act" can be said to have obstructed justice, the Manual's explanation clearly casts a broader net. As an example of obstruction of justice, the explanation includes an attempt, "by means of bribery, intimidation, misrepresentation, or force or threat of force," to prevent the communication of crime-related information to a person authorized to investigate or prosecute the crime.[25]

Under the example, as long as one of the prohibited means is present, official knowledge of the crime is unnecessary—an attempt to prevent official knowledge is a violation. As the most recent of the three cases indicates, however, the Manual's provisions on obstruction of justice reflect some drifting of the offense from its common law moorings. The courts have not yet decided whether the article 134 offense is broad enough to cover what the Manual purports it to cover.

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[19] 30 M.J. at 586.

[20] USAREUR Reg. 550-50, para. 13b.

[21] *Id.*; USAREUR Reg. 27-10, Legal Services: Military Justice, para. 7b (3 July 1985).

[22] 30 M.J. at 586.

[23] 30 M.J. at 587.

[24] MCM 1984, pt. IV, para. 96b.

[25] *Id.*

The facts of the first case: Private Guerrero, his wife, and two other couples drove to a club in Friedberg, West Germany, for drinks, music, and dancing. At closing, as the couples were getting into Private Guerrero's car, an argument with another patron nearly boiled to a fight. After everyone had entered the car, the patron kicked its front bumper. In a rage, Private Guerrero raced his car's engine, shoved the transmission into drive, and plowed the car into a crowd of people, hitting several and ultimately crashing into a store front. Quickly backing his car out and hitting a nearby taxi cab in the process, Private Guerrero sped off with his astonished guests. On the road home, Private Guerrero stopped and turned to his passengers. He instructed them to tell the military police his car had been stolen.[26]

While the facts offered the court an opportunity to address the official knowledge issue, that issue was not raised. Instead, the Court of Military Appeals concentrated on the multiplicity issues in the case. The government had charged Guerrero twice for the instruction to his passengers, once for each of two passengers who heard the instruction. Ironically, the court based its decision in favor of the appellant on an interpretation of the obstruction of justice offense that may have undermined the sufficiency of all the government's proof, not just its argument on multiplicity. Rejecting the government's argument that the provision was designed to protect potential witnesses, the court held the provision's only purpose was to protect "the administration of justice in the military system."[27]

Shortly before the decision in *Guerrero*, the Army Court of Military Review issued a decision affirming the limited purpose of the offense, but establishing a standard that would not have supported Guerrero's conviction. The facts are as follows: Staff Sergeant Gray had sexual liaisons with two of his students from the Academy of Health Sciences, Fort Sam Houston, Texas. After the first tryst, Sergeant Gray told his paramour not to tell anyone what had happened between them. His encounter with the second student followed shortly thereafter. When Sergeant Gray became aware his second lover was telling other students about their relationship, he quickly instructed her to stop talking about the incident and warned that they would both get in trouble if she did not.[28]

In dismissing Sergeant Gray's conviction for obstruction of justice, the Army court ruled:

> [T]here must be some allegation that an official authority has manifested an official act, inquiry, investigation, or other criminal proceeding with a view to possible disposition within the administration of justice of the armed forces. That fact must be known by the accused and he or she must take some affirmative act by which he or she endeavors to influence, impede, or otherwise obstruct that official action in some given objective manner before a charge of obstruction of justice will lie.[29]

In the third case, the Army court backed away from the standard in *Gray*, but nevertheless used the case to address a similar fact pattern. These are the facts: While on duty as the night-shift supervisor of the medical laboratory at Landstuhl Army Hospital, Sergeant Asfeld telephoned the emergency room. A medical technician answered. In her ear, Sergeant Asfeld allegedly whispered a string of indecent remarks. After calling Sergeant Asfeld by name and asking why he was doing this, she cut off his obscenities by hanging up the telephone. Ten minutes later a second call came. Beating a coworker to the phone, the technician picked up the receiver to hear a continuation of the earlier remarks. When she threatened to report the calls, the caller said, "Don't report me," and continued with his indecencies.[30]

Faced with apparent conflicts between *Gray* and *Guerrero*, and between the Manual and the common-law development of obstruction justice in the military, the Army court distinguished the two cases and questioned the legitimacy of the Manual's apparently broad reach. As for the cases, the court said that, without more, the "mere attempt to conceal an offense ... does not establish a specific intent to subvert or corrupt the *administration* of justice."[31] Into this category fell *Gray* and *Asfeld*. *Guerrero*, on the other hand, represented conduct that "anticipated the actual corruption of the criminal investigation by material misrepresentations."[32]

Not content with this distinction, the court went on to question the validity of the Manual's ostensive proscription of acts designed to circumvent the reporting of crime-related information to officials responsible for the administration of justice. As the court recognized, "the

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[26] United States v. Guerrero, 28 M.J. 223, 224-25 (C.M.A. 1989).

[27] 28 M.J. at 227 (quoting United States v. Long, 6 C.M.R. 60, 65 (C.M.A. 1952)).

[28] United States v. Gray, 28 M.J. 858, 860 (A.C.M.R. 1989).

[29] 28 M.J. at 861 (citing United States v. Tedder, 24 M.J. 176, 179 (C.M.A. 1987); United States v. Ridgeway, 13 M.J. 742 (A.C.M.R. 1982)).

[30] United States v. Asfeld, ACMR 8801120, slip op. at 2-3 (A.C.M.R. 1990).

[31] *Asfeld*, slip op. at 13-14 (emphasis of the court).

[32] *Id.*

gravamen of the offense is the corruption of the 'due administration' of the processes of justice and not simply the frustration of justice in the abstract. In this, there exists a conflict between judicial precedent and the Manual."[33] The drafters of the Manual, the court found, had looked to federal statutes with a different purpose—the protection of people rather than systems—for its ostensive criminalization of attempts to keep people from reporting what they know about a crime.[34] The law in this area is unsettled.

As long as the language in the Manual seems to permit it, prosecutors will continue to stretch the coverage of the offense beyond what case law says it was intended to reach. Defense counsel should use the case law to shorten the prosecution's leash as much as it can in this area. Reliance on the Manual's language may result in an unwarranted conviction for a client. Captain Brian D. Bailey.

"But, I Don't Remember Asking for that Delay"

A recent opinion of the Court of Military Appeals authored by Judge Cox appears to cast the viability of *United States v. Cole*[35] further into doubt and obfuscates trial defense counsel's responsibility in cases involving possible violations of an accused's right to a speedy trial. In *United States v. King*[36] the Court of Military Appeals held that pretrial periods of delay could be charged to the defense for speedy trial purposes even though the prosecution was not able to proceed at the time.[37] Noting that, like most rights, speedy trial can be waived, the court held that where the defense affirmatively seeks a delay, consents to a delay, or requests government action that necessarily requires reasonable time for accomplishment, the defense waives government speedy-trial accountability for those periods of time.[38] The court's position seems to be that if the defense is responsible for, is agreeable to, or in any way benefits from a delay, then the defense will not be allowed later to demand dismissal based on that same delay, even though the prosecution was not in a position to proceed at the time.[39]

In *King* a fifty-six-day period of delay was attributed to the defense in spite of the fact that during this period the government awaited the results of a second autopsy of the murder victim that was deemed necessary by the prosecution.[40] The basis for attributing this delay to the defense was a defense request for a psychiatric evaluation of the accused that came after the second autopsy was conducted, but while the results were pending. Even though the reports of the autopsy and the psychiatric testing became available on the same day (which meant that no delay actually resulted from the defense request), the court held that the time between the defense request and submission of the final report was chargeable to the defense.[41] In so holding, the court rejected arguments on appeal that the nature of the offense would have required the government to inquire into the accused's mental responsibility, whether or not the accused requested such an inquiry, and that the defense could have relied on a report of psychiatric evaluation that was completed a month before the report of psychiatric testing was submitted.[42]

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[33] *Id.* at 13.

[34] *Id.* at 14-15.

[35] 3 M.J. 220 (C.M.A. 1977).

[36] 30 M.J. 59 (C.M.A. 1990).

[37] 30 M.J. at 64.

[38] 30 M.J. at 66.

[39] *But see* United States v. Carlisle, 25 M.J. 426 (C.M.A. 1988); United States v. Kohl, 26 M.J. 919 (N.M.C.M.R. 1988) (defense counsel's suggestion of a trial date beyond 90 days of pretrial confinement was not defense delay); United States v. Cook, 27 M.J. 212 (C.M.A. 1988) (defense counsel's request for production of government witness at article 32 hearing was not request for delay until witness was produced).

[40] The victim's body was found over two weeks after death. The head and neck areas of the body had decomposed more rapidly than the remainder of the body, and the head separated from the torso when investigators first lifted the body. This made forensic pathology uncertain. Moreover, the first autopsy was conducted by a doctor who asked not to perform the autopsy because he felt he was not qualified to do so, but was ordered to conduct the autopsy. This autopsy failed to reveal a cause of death or to link the accused in any way to the homicide. It was later determined by the government that it would be necessary to exhume the body and conduct a second autopsy. However, the second autopsy was also inconclusive.

[41] 30 M.J. at 64.

[42] This report of evaluation sufficiently resolved the matter of the accused's mental responsibility so as to allow both sides to proceed to trial. Further delay, therefore, was not necessary to resolve matters arising from the defense request for a psychiatric evaluation. The delay between the submission of this report and the submission of the second autopsy report arguably benefited only the government.

A second issue of delay allocation arose from a defense request that the original convening authority recuse himself and that a new convening authority assume jurisdiction to avoid "an issue about his ability to objectively determine [appropriate action]," and "the appearance of impropriety."[43] This request was granted, and seven days were consumed in referring the charges anew and serving them on the accused. At trial, the military judge charged these days to the government. The Court of Military Appeals found that this seven-day period was excludable from government accountability. The court held that the ensuing delay occasioned by this request "constituted a 'period of delay resulting from a delay in a proceeding or a continuance in the court-martial granted *at the request* or with the consent of the defense,'"[44] and was subject only to "reasonableness of duration."[45]

The court also addressed the allocation of delay that resulted from the granting of a defense motion for a new pretrial investigation.[46] After this motion was granted, the defense moved for a seven-day continuance to prepare for the investigation. The military judge properly charged this seven-day delay to the defense, but charged the remaining ten days used to complete and forward the report of investigation to the government. Although the Court of Military Appeals held that the military judge did not abuse his discretion in allocating "only" seven of the seventeen days of delay to the defense, the court implied that the entire period could have been attributed to the defense.[47]

Finally, the court considered the allocation of several docketing delays. On 4 December, at an informal scheduling conference, trial counsel submitted a "docket sheet" to defense counsel requesting a trial date of 20 December. This date was "informally" set. However, defense counsel also stated that he was a "long way from being ready to go to trial" and ultimately returned the docket sheet (on 6 December) requesting a trial date of 7 January. The military judge found that the period from 4 December to 20 December, the trial date requested by the government, was attributable to the government. The Court of Military Appeals disagreed. Noting that the defense clearly was not prepared to proceed even on motions before the 20th, the court held that this time was chargeable to the defense under Rule for Courts-Martial 707(c)(3).[48]

As justification for allocating so much of the delay to the defense, the court noted the military judge's observation that at no time prior to the motion for dismissal for lack of speedy trial did the defense request an immediate trial, and, to the contrary, that the defense posture was not that of seeking a speedy trial, but that of requiring a great deal of time in order to prepare an adequate defense.[49] That the court took time to mention this is itself noteworthy. The court appears to be saying that as long as the defense posture prior to moving for dismissal for lack of speedy trial is one of welcoming delay, then the defense will not be allowed to ultimately characterize that delay as denial of speedy trial for which charges should be dismissed.

As a practical matter, the holdings in *King* should have minimal effect on a diligent trial defense counsel. Trial strategy should always be developed early. If delay is necessary to execute this strategy, then defense counsel should be prepared to accept responsibility for this delay. In cases where it appears that the government would have difficulty in presenting sufficient evidence within applicable speedy-trial periods, then the defense must be careful not to accept the delay by its actions or posture in the case. Delay that apparently benefits the defense, even if not specifically requested by the defense, may still be allocated to the defense. Therefore, trial defense counsel may wish to forgo requests for pretrial action or motions for appropriate relief that will result in substantial delay when the benefits of the action are outweighed by the risk that the time period involved, otherwise attributable to the government, will be charged to the defense and the possibility of a speedy-trial dismissal will consequently be lost. CPT Andrew G. Oosterbaan.

Inadmissible Evidence as Basis for Mistrial

The Army Court of Military Review recently determined that a soldier convicted of killing his wife did not

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[43] The defense apparently believed that this case had become notorious, and that the convening authority was being pressured by "DA," so that his continued jurisdiction over this case would have prejudiced the accused.

[44] 30 M.J. at 65 (emphasis in the original) (quoting R.C.M. 707(c)(3)).

[45] *Id.* (citing United States v. Longhofer, 29 M.J. 22 (C.M.A. 1989)).

[46] *See* UCMJ art. 32. The investigating officer had conducted ex parte interviews with Army criminal investigators and received ex parte advice from his legal advisor without notice to the defense. At the first hearing, the defense asked that the investigating officer be replaced on these bases, but the request was denied.

[47] 30 M.J. at 65.

[48] 30 M.J. at 64-65. Contrary to the military judge's finding at trial, the court also allocated a period of delay from 1 March, the date the government submitted a second docketing sheet to the defense, to 8 March, the date the defense agreed to hold a motions session, to the defense as delay or continuance "granted at the request or *with the consent* of the defense." 30 M.J. at 65 (quoting R.C.M. 707(c)(3)) (emphasis by the court).

[49] 30 M.J. at 66.

receive a fair trial. Accordingly, the court set aside the findings of guilty and the sentence. In *United States v. Donley*[50] the Army court ruled that the military judge erred when he did not sua sponte declare a mistrial when the president of the court-martial admitted that he overheard inadmissible testimony and, despite a curative instruction, equivocated on his ability to disregard the improper evidence.

The accused was charged with murdering his wife by strangulation. The only issue at trial regarding the murder charge was the accused's intent. While litigating a question on the admissibility of evidence, the victim's lover testified at a side-bar conference called by the military judge that the victim had said she had divorced her husband because he had previously tried to kill her by "strangulation or choking."[51] Although the military judge ruled that the testimony was inadmissible,[52] it came to the attention of the trial defense counsel that the inadmissible testimony may have been overheard by members of the panel.

The president of the panel acknowledged that he had overheard the inadmissible testimony. During individual voir dire, the president of the panel stated that he would try not to consider the testimony in determining the accused's guilt or innocence. The military judge informed the president the statement was inadmissible and must not be considered. Nevertheless, the president was uncertain whether he would truly be able to put aside consideration of the testimony. The military judge stated that, absent an objection by the trial defense counsel, he intended to declare a mistrial. Trial defense counsel, however, objected to a mistrial and requested only a curative instruction.[53]

A military judge is responsible for ensuring that an accused receives a fair trial.[54] A declaration of mistrial is one tool available to a military judge when necessary to fulfill his or her duty to protect the fairness of a trial.[55] A mistrial may be appropriate "because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings."[56] Mistrial is considered a drastic remedy, however, and it should be used only where the circumstances demonstrate "a manifest necessity to terminate the trial to preserve the ends of public justice."[57]

The Court of Military Appeals has stated that where a curative instruction is sufficient to avoid prejudice to an accused, it is a preferred remedy to mistrial when court members have heard inadmissible evidence. When a curative instruction has been used, the issue on appeal is whether the instruction avoided prejudice to the accused or whether the failure to declare a mistrial was an abuse of discretion by the judge.[58]

In the *Donley* case, the Army court acknowledged that receipt of improper evidence was grounds for a mistrial.[59] It further acknowledged that granting a mistrial is not the only curative measure for all cases where improper evidence has been received.[60] However, the Army court stated that the president's inability to disregard the inadmissible testimony demonstrated that the appellant had only four impartial members on his panel of five members.[61] Mistrial, the court stated, was the only remedy that could assure a fair trial for the accused.[62]

Although it is the military judge's responsibility to ensure the accused receives a fair trial, defense counsel must remain alert to situations like those in *Donley*. The issue of overheard inadmissible testimony must first be identified on the record by counsel. The *Donley* decision shows that it *is* possible to demonstrate that a member would be unable to completely disregard inadmissible evidence that is inadvertently overheard during trial. Defense counsel should attempt to exploit this very human inability to disregard evidence by demonstrating that the member lacks the necessary constitutional standard of impartiality. Captain Allen F. Bareford.

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[50] ACMR 8802432 (A.C.M.R. 4 May 1990) (one judge dissenting).

[51] *Donley*, slip op. at 2.

[52] The military judge held that the evidence was inadmissible because it was extremely damaging, it was hearsay that began with a lie (that the victim was divorced, when she was not), and it lacked any indicia of reliability.

[53] On appeal a separate error was asserted concerning denial of effective assistance of counsel when defense counsel failed to move for a mistrial and objected to the military judge's proposal to declare a mistrial. The Army court did not address this error due to its disposition of the case based upon the error by the military judge. *Donley*, slip op. at 6.

[54] United States v. Graves, 1 M.J. 50, 53 (C.M.A. 1975).

[55] United States v. Lynch, 26 C.M.R. 303 (C.M.A. 1958).

[56] R.C.M. 915.

[57] United States v. Simonds, 36 C.M.R. 139, 142 (C.M.A. 1966).

[58] United States v. Evans, 27 M.J. 34, 39 (C.M.A. 1988).

[59] *See Donley*, slip op. at 5 (citing United States v. Jeanbaptiste, 5 M.J. 374, 376 (C.M.A. 1982); United States v. Johnpier, 30 C.M.R. 90 (C.M.A. 1961)).

[60] *Id.*

[61] *Donley*, slip op. at 6.

[62] Besides a curative instruction, the court noted that in some cases the military judge could sua sponte challenge the member who overheard inadmissible evidence. This option was not possible in *Donley* because the challenge would have left an insufficient number of members to meet the statutory minimum on the court. *Id.* at n.9.

The Residual Hearsay Exception: An Overview for Defense Counsel

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Introduction

The residual hearsay rule is a relatively new exception to the general rule that hearsay is not admissible.[1] Since 1982, there have been approximately twelve residual hearsay cases in the military that have been decided at the appellate level. All of these cases dealt with the admissibility of evidence in the prosecution of a family member or a future family member for sexual or physical abuse. The government has been successful in introducing evidence under the residual hearsay rule in only four of these cases. This article will outline the appellate courts' rationale behind admitting or denying the admission of statements under residual hearsay and will present a simple defense checklist for potential objections to evidence offered under this exception.

The residual hearsay rule permits the admission into evidence of a statement made by a witness or a victim to a third party that would not fall within the purview of any other hearsay exception. It has been used in those cases involving crimes against family members where the family member has either refused to testify against the accused, recants the initial testimony, or refuses to enter a court appearance. This catch-all exception to the hearsay rule is provided for under Military Rules of Evidence 803(24)[2] and 804(b)(5).[3]

In order for a statement to be admitted under Military Rules of Evidence 803(24) or 804(b)(5), it cannot be covered by any other hearsay exception and it must have equivalent circumstantial guarantees of trustworthiness. In addition, the proponent must provide sufficient notice in advance of the trial or hearing of his or her intent to present evidence under this exception so that the adversary has an adequate opportunity to respond. The court must find the following before admitting a statement under the residual hearsay exception: 1) that the declarant is available [Military Rule of Evidence 803(24)] or unavailable [Military Rule of Evidence 804(b)(5)]; 2) that the statement is offered as evidence of a material fact; 3) that the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and 4) that admission of the statement will serve the interests of justice.

The Cases

United States v. Ruffin[4] was one of the earlier cases in which the residual hearsay exception argument was successful. There, the Air Force Court of Military Review upheld the lower court's admission into evidence of a statement by the accused's thirteen-year-old stepdaughter that the accused had sodomized her. The sworn statement was taken by the military police two days after the incident. At trial, the stepdaughter refused to testify against her stepfather. The appellate court admitted the stepdaughter's statement under the residual hearsay rule, finding her unavailable within the meaning of Military Rule of Evidence 804(b)(5) and holding that the prior statement had circumstantial guarantees of trustworthiness.[5]

The court based its determination concerning circumstantial guarantees of trustworthiness on four factors: 1) the time between the statement and the alleged event was short; 2) the child had made a sworn statement concerning the incident; 3) other evidence corroborated where the accused was stationed at the time of the incident; and 4) the declarant's refusal to testify was motivated by her desire to help her stepfather.[6]

The following year, the Army Court of Military Review ruled against the admission of statements under the residual hearsay exception in two cases: *United States v. King*,[7] and *United States v. Thornton*.[8] Although both *King* and *Thornton* addressed the issue of circumstantial guarantees of trustworthiness, *King* focused on the fact that the child recanted her testimony and provided a plausible motive to fabricate. *Thornton* focused on the accused's overriding sixth amendment right to confront the victim-accuser and considered the fact that the victim was unavailable at court.

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[1]Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 802 [hereinafter MCM, 1984, and Mil. R. Evid., respectively].

[2]Mil. R. Evid. 803(24).

[3]Mil. R. Evid. 804(b)(5).

[4]12 M.J. 952 (A.F.C.M.R. 1982), *pet. denied*, 13 M.J. 494 (C.M.A. 1982)

[5]*Id.* at 955.

[6]*Id.*

[7]16 M.J. 990 (A.C.M.R. 1983), *remanded*, 17 M.J. 403 (C.M.A. 1984), *set aside*, 24 M.J. 774 (A.C.M.R. 1987).

[8]16 M.J. 1011 (A.C.M.R. 1983).

In *King* the Army Court of Military Review held that three sworn statements taken from the fifteen-year-old wife-to-be of the accused (CPT King) by the military police were not admissible under Military Rule of Evidence 803(24) because the government had failed to establish that these statements had the "equivalent circumstantial guarantee of trustworthiness."[9]

The wife-to-be testified in court and admitted that she made the three sworn statements, but claimed she did so after her father had impregnated her. She claimed that she had wanted to shift the blame away from her father. The wife-to-be claimed that she had reported her father to the police before on allegations of child abuse, but nothing was ever done about him. The prosecution offered no rebuttal evidence.

The court looked at the circumstances surrounding the statement and reviewed the accuser's motive to fabricate. The court held that the witness had an equally strong motive to testify falsely at trial (to protect her marriage) as she had to testify falsely to police (fear of her father). The court further considered the fact that none of the three sworn statements were corroborated by any physical evidence and that they were made to law enforcement agents as opposed to immediate family members or close friends.

In making its determination, the court stated, "Unlike the hearsay exception dealing with an excited utterance, statements made to police officers are often calculated to convince rather than to convey an emotional reaction. Such statements are obviously more suspect and must be scrutinized carefully."[10]

In *Thornton* the court held that the sworn statement from the accused's girlfriend that the accused had beaten her was not admissible under the residual hearsay exception. The victim refused to appear in court and testify, despite being subpoenaed. She had previously testified at the article 32 investigation. Despite this, the Army Court of Military Review held that there was not sufficient indicia of reliability to permit the hearsay statement of an unavailable victim to overcome the accused's sixth amendment right to confront his witnesses. The court based its decision on three facts: 1) it was not satisfied that the defense had an adequate opportunity to extensively cross-examine the witness at the article 32 investigation because the investigation was used by the defense primarily for discovery purposes;[11] 2) the statement by the victim was made four months after the incident in question; and 3) the statement was taken by an assistant staff judge advocate for the purpose of prosecution.[12]

In *United States v. Crayton*[13] the Air Force Court of Military Review followed the *King* and *Thornton* cases when it ruled that the military judge erred in admitting into evidence the statement from the stepdaughter that her father had fondled her breasts and genitalia. In that case, the accused's fourteen-year-old step-daughter was placed in Child Protective Services for suspected child abuse in November 1982. In January 1983, the stepdaughter refused to make a statement to Office of Special Investigations (OSI) agents. Finally, in February 1983, she made a sworn statement to the OSI that her father had sexually abused her in 1981. At the article 32 investigation, the stepdaughter refused to discuss the incident other than stating "yep" when asked if it had really happened. At trial, the daughter recanted her prior statement, claiming that she made the entire story up because she hated the accused and resented her mother for having married him. The court stated:

> It follows that not every extra-judicial statement of a witness meets the conditions that must be satisfied under the Rule before it can be admitted. The circumstances that support its trustworthiness is the linchpin governing its admissibility. In the case at bar, there is a dearth of physical or testimonial evidence showing that the out-of-court statement of [the stepdaughter] represented the truth. At trial she testified that her statement was false and gave a plausible explanation why she wrongly accused her stepfather of sexual misconduct. In summary, we find that the circumstantial guarantees of trustworthiness that were present in the statement admitted in *Ruffin*, *supra*, are lacking here. We realize that corroboration is not required to admit a statement offered under Mil. R. Evid. 803(24), but the presence or absence of corroborating evidence is a circumstance to be examined.... Here there is little to give [the stepdaughter's] statement an indicia of reliability.[14]

In *United States v. Henderson*[15] the Air Force Court of Military Review applied a two-prong test for admitting evidence under the residual hearsay rule. In this case, the accused's fifteen-year-old hospitalized stepdaughter provided a detailed sworn statement to a child advocacy case worker and law enforcement officials in which she

[9] *King*, 16 M.J. at 991.

[10] *Id.* at 993.

[11] *But see* United States v. Connor, 27 M.J. 378 (C.M.A. 1989).

[12] *Thornton*, 16 M.J. at 1015.

[13] 17 M.J. 932 (A.F.C.M.R. 1984).

[14] *Crayton*, 17 M.J. at 934.

[15] 18 M.J. 745 (A.F.C.M.R. 1983).

alleged sexual abuse on the part of her stepfather. The alleged abuse spanned a twenty-one-month period. The child stated that she had told her mother about the abuse three months before. The mother, in turn, confronted the stepfather, and a decision was made to start family counseling. This went on for two weeks until the accused resumed abusing the stepdaughter. The stepdaughter subsequently ran away from home. The stepdaughter refused to comply with a subpoena ordering her presence at trial. There was no evidence of intent to falsify or distort on the child's part. In ruling that the statement was properly admissible, the court stated that the residual hearsay rule does not violate the accused's sixth amendment right to confrontation if it is certain that the declarant made the statement and there is circumstantial evidence supporting the truth of the statement. This two-prong test for admitting evidence under the residual hearsay rule was finally adopted by the Court of Military Appeals in *United States v. Hines*,[16] where the court considered 1) whether the statement had circumstantial guarantees of trustworthiness; and 2) whether the interests of justice in admitting this statement overrode the accused's sixth amendment right to confront his accuser.

In *Hines* the accused was charged with sexually abusing his two daughters. The accused's wife reportedly walked in on the incident and subsequently gave a sworn statement to that effect to the military police. The two daughters also made sworn statements to the military police concerning this incident. After this, the two daughters made inconsistent statements to the social worker. By trial, the family had reconciled, and both the daughters and the wife refused to testify against the accused. The trial judge admitted the statements under Military Rule of Evidence 804(b)(5).

While the court found that the statements were reliable, it held that these statements violated the accused's sixth amendment right to confrontation. The statements were taken by law enforcement officials, and the defense did not have an opportunity to cross-examine the witnesses concerning their statements because they refused to testify. The court stated:

> Our concern, notwithstanding due respect for the law-enforcement community, is whether *ex parte* statements to law enforcement officers are obtained with such a degree of bipartisanship that an accused cannot reasonably contend that the purposes of cross-examination have been served.... On this record, we think that the investigative process was not equivalent to the judicial process, and we would not ordinarily expect it to be.[17]

In *United States v. Barror*[18] the Court of Military Appeals applied the *Hines* test and held that the lower court erred in admitting the sworn statement of the accused's stepson under the residual hearsay exception. The Court of Military Appeals found insufficient indicia of reliability to warrant the admission of the statement into evidence under the residual hearsay exception. The court noted that there was no meaningful basis for assessing the accuracy of the statement or the candor of the victim. In that case, the accused's stepson gave a sworn statement to the military police in which he alleged that his stepfather had sexually abused him. The statement was made within minutes after the alleged incident occurred. There was evidence of semen found on the stepson's clothing that was identified as belonging to someone other than the child. Although the tests indicated that the semen may have come from the accused, further identification of the source was not possible because of the limited amount of semen collected. The stepson made a court appearance, but refused to testify against his stepfather, stating that he did not want to aid in the prosecution of his stepfather for this offense.

The lower court made the following findings in ruling that the statement was admissible under Military Rule of Evidence 804(b)(5): 1) the statement was evidence of a material fact not open to debate; 2) the statement was more probative on the point for which it was offered than any other available evidence; 3) the statement was made within minutes after the incident took place and long before there was any action pending against the stepfather; 4) there was no apparent incentive to falsify or distort the occurrences; 5) the statement described in detail the extent of the event; 6) the stepson never recanted his statement and had reaffirmed its truthfulness six months later; 7) the stepson was unavailable because he refused to testify; 8) forensic analysis of the stepson's clothing corroborated the assertion that the stepson was a victim of a sexual assault; and 9) the defense was given adequate notice that the government intended to offer the stepson's statement as evidence.[19]

The Court of Military Appeals stated that the facts in this case did not satisfy the *Hines* test because there was little evidence provided concerning the circumstances surrounding the taking of the statement or of its

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[16] 23 M.J. 125 (C.M.A. 1986).

[17] *Id.* at 137.

[18] 23 M.J. 370 (C.M.A. 1987).

[19] *Barror*, 23 M.J. at 371.

confirmation through corroboration. The court, in analyzing the case in terms of the applicability of the residual hearsay rule and the confrontation clause, stated:

> While we know that the statement exists, that it was sworn to and signed, and that it came into being early in the chronology of events, the record reveals virtually nothing of the dynamics of the interview/interrogation process itself or the state of mind of the declarant. In short, there is no meaningful basis for assessing the candor of the declarant or the accuracy of the statement. Moreover, the corroborating factors—that there was semen on [the stepson's] pajamas and that the appellant could not be excluded as the source—are anything but conclusive. Thus, we are not satisfied, on this record, that appellant's inability to confront his accuser was insignificant. Indeed, these relatively meager facts make this case virtually indistinguishable from most cases in which the police have taken statements from a witness, ... If this statement is so reliable that confrontation may be excused, then virtually every statement to police will be admissible where the declarant is "unavailable." We saw no indication in *Hines* that the Confrontation Clause has been relaxed to that extent.[20]

In *Barror* the Court of Military Appeals addressed the fact that the accused had later confessed to the offense for which he was charged. The military judge had relied on the confession as a basis of indicia of trustworthiness by the victim. The court stated that the focal issue in the case was the ability of an accused to put the government to its burden of proving him guilty beyond a reasonable doubt using only legally competent evidence. In the case, the Court of Military Appeals found that the government had not met the requisite criteria.[21]

The Air Force Court of Military Review followed the holding of *Hines* in *United States v. Lockwood*,[22] when it held that the out-of-court statements of an alleged victim of sexual abuse who later recanted those statements were inadmissible under Military Rule of Evidence 803(24) because the statements lacked circumstantial guarantees of trustworthiness.

In this case, a twelve-year-old made statements to her school counselor that her father had sexually abused her. The CID obtained two sworn statements from the girl that same day and a third sworn statement two days later. At trial, the daughter recanted her prior statements. The mother testified concerning her daughter's character for untruthfulness and provided a motive for her fabrication.

In ruling that the statements were inadmissible under the residual hearsay exception, the court stated:

> While actual corroboration of a declarant's statement is not required, the surrounding circumstances must confirm the reliability of the statement. Indeed, the keystone to a statement's admissibility is its indicia of reliability. Here, there is precious little physical or testimonial evidence establishing that the out-of-court statement of [the daughter] represented the truth.
>
> The victim's judicial denial that her father sexually abused her undermines whatever evidence was previously available to establish the required "circumstantial guarantees of trustworthiness." ... [M]erely repeating a story a number of times does not add weight to it.... [The daughter's] testimony is, of course, crucial to the prosecution's case, but it is also manifestly true that she was either untruthful when she stated that her step-father molested her or when she denied, under oath, that he did not.... [W]e are aware that victims of parental sexual abuse may be subjected to intense "pater familias" pressure not to testify concerning what took place or to deny that it ever happened .... Such a situation might well be used to establish "indicia of reliability" of an out-of-court statement later recanted in court. Here, however, there is nothing to suggest that this occurred.[23]

In *United States v. Dunlap*[24] the Court of Military Appeals held that a statement by the accused's eleven-year-old stepdaughter to law enforcement agents that her father had sexually abused her was admissible under the residual hearsay rule. The court based its ruling on the circumstances surrounding the child's statement that confirmed her candor. In this case, the stepdaughter had previously told her babysitter of the stepfather's acts. On the evening in question, she returned to the babysitter's house in an emotionally distraught state and claimed that her stepfather had once again molested her. Five hours later, the stepdaughter made a sworn statement concerning the allegation to law enforcement agents. The stepdaughter did not appear to testify against the stepfather. The Court of Military Appeals held that the statement by the stepdaughter to law enforcement agents was admissible because she had made a virtually identical statement to the babysitter while in an emotional state.

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[20] *Barror*, 23 M.J. at 373.

[21] *Id.*

[22] 23 M.J. 770 (A.F.C.M.R. 1987).

[23] *Id.* at 771-72 (citations omitted).

[24] 25 M.J. 89 (C.M.A. 1987).

In *United States v. Quarles*[25] the Navy Court of Military Review ruled that the military judge had erred in using the residual hearsay exception to admit statements by the accused's three children that they were sexually abused by their father. At trial, two of the children testified and denied sexual abuse. The other child testified, but stated that her babysitter had told her what to say. All children testified via closed circuit television. The Navy Court of Military Review held that the statements by the children were not sufficiently trustworthy to warrant admission under either residual hearsay exception.

In so ruling, the court stated that in order to admit a statement under the residual hearsay exception without the benefit of the right of confrontation,

> it must have been taken under such circumstances so as to satisfy confrontation values and serve as an effective substitute for cross-examination. In other words, there must be evidence presented showing the candor of the declarant and the truth of the statement to such a degree that the need for confrontation is made unnecessary.[26]

In this case the court held that, in spite of their young age and precocious knowledge of the sexual process, the children's out-of-court statements lacked sufficient indicia of trustworthiness. The court noted the following facts: that the children's knowledge could have come from pornographic magazines kept in the home; most of the babysitters to whom the statements were made held grudges against the accused; the later statements were taken from the children by people who were apparently operating under the assumption that sexual abuse had occurred; the statements were inconsistent; and, the defense had little or no opportunity to speak to the children and the witnesses before trial.

In *United States v. Williamson*[27] the Court of Military Appeals held that the testimony of a four-year-old child's statement to her grandfather concerning her father's alleged sexual abuse was not admissible under the residual hearsay exception. Here, the child reportedly made a statement to her grandfather that she had been molested by her father. Approximately two to three weeks later, the child was seen by a social worker. After numerous visits to the social worker, the child related information that the social worker interpreted to mean her father had sexually molested her. Shortly before trial, however, the child denied to the social worker that her father had molested her. The parents were in the middle of a messy divorce and the grandparents had brought separate suit for custody. There was no physical evidence of abuse. At trial, the child refused to inculpate her father.

In ruling that the testimony to the grandfather was inadmissible under Military Rule of Evidence 803(24), the court stated,

> [T]he Government can point to no precedent from any jurisdiction which would find that a grandfather's recitation of what his grandchild told him has "guarantees of trustworthiness." His testimony is made particularly suspect when it is considered that he is seeking in a separate lawsuit to take custody of the child away from her natural father. It almost has "circumstantial guarantees of" untrustworthiness.[28]

In *United States v. Quick*[29] the Court of Military Appeals affirmed the lower court's admission into evidence of a child's statement to her babysitter that her father had sexually abused her. In the case, the child had complained to her babysitter that her bottom hurt. In questioning the child concerning her soreness, the child told the babysitter that her father had rubbed her vaginal area with his fingers. At trial, the child was not called as a witness by the prosecution. The defense objected to the testimony of the babysitter, but did not request that the child be called to testify as a hostile witness, even though the government expressly indicated that it could do so. The child had testified at a prior article 32 investigation and was outside the courtroom during the trial. The Court of Military Appeals considered all these factors and ruled that, under the circumstances, the accused's right of confrontation was not violated.

Defense Counsel Checklist

From these cases, it should be clear that the defense has two potential objections to evidence offered under the residual hearsay exception. First, the defense can object based on arguments of lack of circumstantial guarantees of trustworthiness. Second, the defense may argue that the admission of this statement violates the accused's right of confrontation provided under the sixth amendment of the Constitution.

In making these objections, the defense must focus on the weaknesses of the government's case in the following eight areas:

1. *Time elapsed between date of statement and alleged offense.* Obviously, a statement made months and even

[25] 25 M.J. 761 (N.M.C.M.R. 1987).

[26] *Id.* at 769.

[27] 26 M.J. 115 (C.M.A. 1988).

[28] *Id.* at 117.

[29] 26 M.J. 460 (C.M.A. 1988).

years after an alleged incident is more likely to be suspect.

2. *Whether the statement was made under oath.* The courts are reluctant to admit unsworn statements into evidence in light of the seriousness of a court-martial conviction. An unsworn statement made by a victim of an offense that is not admissible under an established exception to the hearsay rule is rarely admissible. Normally, the admission of such a statement would fall under another exception to the hearsay rule (i.e., medical treatment or diagnosis exception, excited utterance, etc).

3. *Whether there exists some evidence to corroborate the statement.* Although there is no requirement that a statement be corroborated in order for it to be admitted under this exception, the court will consider the existence of or lack of evidence of corroboration in determining circumstantial guarantees of trustworthiness. Obviously, an argument can be made to keep out a statement of a child claiming rape where there is no evidence of vaginal injury or other abnormality. Therefore, the defense must always review the case for lack of corroborating evidence.

4. *Whether the witness has recanted or refuses to testify.* The fact that the witness later recants the statement raises questions concerning the veracity of the original statement. The defense counsel must argue that a judicial denial undermines any evidence previously presented to establish circumstantial guarantees of trustworthiness. The defense should argue that the witness's refusal to testify in court must be considered in the light most favorable to the accused.

5. *Whether there is a motive to fabricate.* Whenever it can present any plausible motive for fabrication on the part of the witness, the defense should argue against admission of evidence under the residual hearsay exception.

6. *Background leading up to the statement.* The defense should always review its case in light of the circumstances that led up to the statement. The emotional state of the witness prior to and at the time of the statement may provide the defense with an argument of the lack of "indicia of reliability." If the government attempts to offer evidence without providing this background information, the defense should object.

7. *To whom was the statement made.* The defense must always consider the status of the recipient of the statement. First, if the statement was made to family member, the defense should consider what the family member's interest is in the outcome of the case. Obviously, the testimony of a family member currently involved in a child custody battle with the accused may have less credibility than if that were not the case. Second, if the statement were made to a third party, the defense should consider whether that person has a grudge against the accused or whether he or she was operating under the assumption that an offense occurred when interviewing the child. Finally, if the statement was made to a law enforcement agent, the defense must argue that the statement should be subject to a stricter scrutiny, as statements made to police agents are often calculated to convince rather than to convey an emotional reaction.

8. *Violation of the accused's sixth amendment right of confrontation.* The defense should always object on sixth amendment grounds in every case where the defense can establish that the defense has not had an adequate opportunity to cross-examine the witness.

Conclusion

The government is allowed to use the residual hearsay exception only if it can convince the court that the out-of-court statement is reliable. To reach that conclusion, the uncontroverted facts must establish the witness's truthfulness. Therefore, the defense counsel must understand the factual setting of each case previously decided by the appellate courts and how the court resolved the issue of reliability. The defense counsel can then apply that same analysis to the case presently being litigated.

Trial Counsel Forum

Urinalysis Cases and Judicial Notice

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Introduction

Since the Army's urine testing program began in the early 1980's, successfully prosecuting a urinalysis case has proven to be a real challenge for trial counsel. When the program first began, the most common method of proving a urinalysis case was to present the complete drug testing laboratory report, the testimony of the personnel comprising the installation chain of custody, and the testimony of a forensic expert from the laboratory to

explain the report. This approach was frequently expensive and time-consuming.[1]

With the passage of time, trial counsel began to present "paper cases."[2] A paper case required the presentation of the chain of custody documents and the complete urinalysis testing report.[3] This method proved short-lived, however, with the United States Court of Military Appeals' decision in *United States v. Murphy*.[4] In *Murphy* the court overturned a Navy conviction for marijuana use that was based on a paper case.[5] The court stated, "we have a 'pure paper' urinalysis case where the prosecution only enters documents evidencing a properly conducted urinalysis together with the scientific test results. There was no in-court expert testimony, and the defense did not stipulate to the meaning of the urinalysis tests."[6] The court concluded that "testimony interpreting the tests or some other lawful substitute in the record is required."[7]

A cursory reading of *Murphy* might lead one to believe that as a result of that decision, the paper case approach to trying urinalysis cases is no longer possible. *The Army Lawyer* recently published an article that proposed that urinalysis cases could still be prosecuted using the paper case approach.[8] The author suggested that this can be accomplished by having the military judge take judicial notice of certain essential facts that satisfy the requirements of *Murphy*.[9]

In the past year, trial counsel at Fort Hood have used a modified version of the paper case and judicial notice with uniformly successful results.[10] This article will explain the methods used in the Fort Hood urinalysis prosecution program and will offer some suggestions on preparing an efficient, low-cost, and winning urinalysis case using judicial notice. While many of the references in this article pertain to cocaine cases, the same principles and concepts are valid in the prosecution of any urinalysis case.

Elements of the Offense

The elements of proof for use of cocaine are: 1) that the accused used cocaine; and 2) that the use by the accused was wrongful.[11] Looking first at the second element, according to the United States Court of Military Appeals, "wrongfulness in this context means the accused knowingly used [drugs] without justification or authorization."[12] Proving wrongfulness in urinalysis cases is not particularly difficult, as the law allows the finder of fact to draw a permissive inference of wrongfulness based upon a positive urinalysis test result.[13] This inference may be drawn even when the accused denies drug use or presents evidence of innocent ingestion that is unrebutted by the government.[14]

Proof of the first element—that the accused used cocaine—is slightly more difficult because the law does not recognize the results of a positive urinalysis test as complete proof of drug use.[15] In addition to proving the results of the urinalysis test, the trial counsel must prove the drug metabolite[16] identified in the accused's urine

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[1] Anderson, *Judicial Notice in Urinalysis Cases*, The Army Lawyer, Sept. 1988, at 19 n.5.

[2] In United States v. Murphy, 23 M.J. 310 (C.M.A. 1987), the court defined a "pure" paper case as "documents evidencing a properly conducted urinalysis together with the scientific test results." *Id.* at 312.

[3] *Id.*

[4] 23 M.J. 310 (C.M.A. 1987).

[5] *Id.* at 312.

[6] *Id.* at 312.

[7] *Id.* at 312.

[8] Anderson, *supra* note 1, at 20.

[9] *Id.* at 21.

[10] *See* United States v. Specialist Larry Burgess, SPCM (III Corps, 21 Feb. 1989); United States v. Specialist Jeffrey B. Agent, SPCM (III Corps, 6 July 1989); United States v. Specialist Cezar J. Mendoza, SPCM (III Corps, 7 July 1989); United States v. Staff Sergeant Dennis D. Bryant, SPCM (III Corps, 18 July 1989); United States v. Private Isaac Hunt, Jr., SPCM (III Corps, 28 Aug. 1989); United States v. Specialist Anita M. Hackett, SPCM (III Corps, 31 Aug. 1989); United States v. Specialist Sheldon V. Walls, SPCM (III Corps, 12 Sept. 1989); United States v. Sergeant Larry E. Hudgens, SPCM (III Corps, 21 Sept 1989); United States v. Sergeant Troy L. Johnson, SPCM (III Corps, 22 Sept. 1989); United States v. Staff Sergeant Ransey Rayford, Jr., SPCM (III Corps, 19 Oct. 1989); United States v. Staff Sergeant Richard A. Fuller, SPCM (III Corps, 7 Nov. 1989); United States v. Staff Sergeant John A. Daniel, SPCM (III Corps, 9 Nov. 1989).

[11] Uniform Code of Military Justice, art. 112a, 10 U.S.C. § 9129 (1988) [hereinafter UCMJ].

[12] United States v. Harper, 22 M.J. 157, 162 (C.M.A. 1986).

[13] United States v. Ford, 23 M.J. 331 (C.M.A. 1987).

[14] *Id.* at 335.

[15] *Murphy*, 23 M.J. 310 (C.M.A. 1987); United States v. Hagen, 24 M.J. 571 (N.M.C.M.R. 1987).

[16] Metabolites are defined as "the chemically altered forms of the drug for which the test is conducted." Anderson, *supra* note 1, at 21.

sample has some relation to an illegal substance. Additionally, counsel must prove that it does not occur naturally in the human body and that it is not a result of some other substance consumed.[17] In the past, proof of these facts was accomplished by calling an expert witness from the testing laboratory.[18] These facts may be established, however, by asking the trial court to take judicial notice of them.[19]

The idea of using judicial notice in a urinalysis case is not without precedent in military courts. In *United States v. Mercer* the Navy-Marine Corps Court of Military Review affirmed a conviction for use of marijuana where

> the military judge took judicial notice that the normal business of the Drug Screening Laboratory is to conduct tests on urine samples to determine the presence or absence of metabolites of controlled substances; that the laboratory is a place where scientific principles are applied in the analysis of urine samples; that in the ordinary course of business it records results of tests and maintains test reports and documents; and that THC is tetrahydrocannabinol, which is the psychoactive ingredient of marijuana.[20]

In another pre-*Murphy* case, the Navy-Marine Corps Court of Military Review went even further and allowed the military judge to draw inferences that would explain the significance of the presence of drug metabolites in an accused's urine.[21] While this case would probably be decided differently today in light of *Murphy*, it is clear that military judges can take judicial notice of indisputable facts related to urinalysis testing that were formerly proven through the use of expert testimony. This conclusion is further supported by *Murphy*, in which the court suggested, in dictum, that there could be a lawful substitute for expert testimony, such as a "stipulation by the parties [or] judicial notice ... taken by the military judge in accordance with Military Rule of Evidence 201."

Requesting Judicial Notice

A request for judicial notice should be in writing and should be submitted to the court and opposing counsel prior to the scheduled trial date. "Prudent trial counsel should request an article 39a session well in advance of court and, through a motion in limine, determine whether the military judge will take judicial notice."[22] In a cocaine case, there are two principles that counsel should seek to have judicially noticed. These are: "(1) the human body produces distinctive metabolites from the metabolism of certain drugs, and these metabolites or the drug itself is excreted into urine;"[23] and "(2) these drugs and drug metabolites are capable of conclusive detection."[24] A sample request for judicial notice is included at the appendix.

The request for judicial notice is based upon Military Rule of Evidence 201,[25] which provides that the military judge may take judicial notice of facts that are not subject to reasonable dispute and are "either (1) generally known universally, locally, or in the area pertinent to the event, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned."[26] The focus in a urinalysis case should be on the second prong of Military Rule of Evidence 201, and the request should include supporting documents whose accuracy cannot be questioned. The documents, which should be admitted as appellate exhibits, should include: 1) the complete drug testing laboratory report, which will normally include an affidavit from a laboratory forensic expert describing the testing procedure and the metabolic breakdown process; 2) *The Army Lawyer* article entitled "Judicial Notice in Urinalysis Cases,"[27] which contains an excellent discussion of urinalysis testing principles and citations to other scholarly articles on this subject; 3) a copy of the drug testing laboratory's most recent certification from the Armed Forces Institute of Pathology; and 4) other appropriate legal or scientific articles that support the propriety of taking judicial notice.[28]

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[17] *Murphy*, 23 M.J. at 312; *Hagen*, 24 M.J. at 572.

[18] *Harper*, 22 M.J. at 160.

[19] Anderson, *supra* note 1.

[20] 23 M.J. 580 (N.M.C.M.R. 1986).

[21] United States v. Merritt, 23 M.J. 654 (N.M.C.M.R. 1986).

[22] Anderson, *supra* note 1, at 28.

[23] *Id.*

[24] *Id.*

[25] Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 201 [hereinafter Mil. R. Evid. 201].

[26] Mil R. Evid. 201.

[27] Anderson, *supra* note 1.

[28] For an excellent source of supporting documentation, see Dubowski, *Drug Use Testing: Scientific Perspectives*, 11 Nova L. Rev. 431 (1987).

The importance of these supporting documents cannot be overstated. They are the basis for the judicial notice, and they allow trial counsel to avoid the due process problems illustrated in the case of *United States v. Conley*.[29] In *Conley* the trial judge relied upon his own expertise as a document examiner in reaching a guilty verdict after the trial counsel failed to call a handwriting expert. The United States Court of Military Appeals reversed the conviction, claiming due process required disqualification of the military judge who had placed himself in the position of being a government witness. There are no due process problems and no need for the military judge to rely on his or her own expertise when trial counsel provide the judge with sufficient scientific documentation to support the decision to take judicial notice.

Litigating the Request for Judicial Notice

As the request for judicial notice is a "preliminary question," the supporting documents should be admitted as appellate exhibits using relaxed evidentiary rules.[30] Once the documents are admitted and the trial counsel has asked the military judge to take judicial notice, the defense can be expected to raise various objections to the request. Objections encountered thus far include: 1) that the request as written creates a prejudicial inference of guilt; and 2) that benzoylecgonine is not a true metabolite and therefore the drug testing laboratory report is inaccurate.

These objections have been routinely rejected for a number of reasons. First, the request, as written, merely points out the facts that can be judicially noticed, and these facts, in and of themselves, are neutral. Second, while benzoylecgonine is not a true metabolite because it can be produced outside the human body as a hydrolysis product,[31] it is still referred to as a metabolite within the pertinent scientific community.[32] The request for judicial notice, as written, does not allege that benzoylecgonine cannot be produced outside the human body. The request states that the primary metabolite found in human urine after cocaine use is benzoylecgonine and that benzoylecgonine is not naturally produced by the human body or by any other substance other than cocaine.

Presenting the Case

While the Court of Military Appeals in *Murphy*[33] seemed to hold that a paper urinalysis case coupled with "some other lawful substitute,"[34] such as judicial notice, would be sufficient to sustain findings of guilty for wrongful use of cocaine, trial counsel should remember that their job is to convince the fact-finder of the accused's guilt, and while a pure paper case may be the least expensive way to try the case, it may not be the most convincing. Nevertheless, when properly presented, in-court testimony, the accused's urine bottle, the chain of custody document, the unit urinalysis ledger book, and judicially noticed laboratory test results make a very convincing case.

Courtroom testimony adds credibility to the government's case by establishing that collection procedures were followed[35] and that the chain of custody was properly maintained. It also allows for the introduction of several evidentiary exhibits, such as the actual urine bottle used in the collection process, the relevant portion of the unit urinalysis ledger book, and the chain of custody document.

The testimony should commence with the unit Alcohol and Drug Control Officer (ADCO),[36] who can identify the accused, his urine bottle (which the trial counsel obtained from the laboratory prior to trial), the chain of custody document, and the unit ledger book. The ADCO can explain the collection process; the securing of the sample with tamper resistent tape; and the safeguarding, storage, and transfer of the secured sample to the Installation Biochemical Collection Point (IBCP).[37]

The ADCO should be followed by the urinalysis observer and the IBCP clerk who received the secured urine sample from the ADCO. The observer will link the accused to the urine bottle, the unit urinalysis ledger book, and the chain of custody document. Additionally, the observer will explain how the bottle was filled by the accused and taped with tamper-proof tape. The IBTC clerk can provide corroboration of the ADCO's testimony that the bottle was sealed when turned into the IBTC and can explain how the bottle was transported to the drug testing laboratory.

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[29] 4 M.J. 327 (C.M.A. 1978).

[30] Mil. R. Evid. 104(a).

[31] *See* Basalt & Chang, *Urinary Excretion of Cocaine and Benzoylecgonine Following Oral Ingestion in a Single Subject*, J. Analytical Toxicology 81 (Mar/Apr 1987); Stewart, Inaba, Lucassen & Kalow, *Cocaine Metabolism: Cocaine and Norcocaine Hydrolysis by Liver and Serum Esterases*, 25 Clin. Pharmacol. Ther. 464 (1979).

[32] *See* Dubowski, *supra* note 28, at 465.

[33] 23 M.J. 310 (C.M.A. 1987).

[34] *Id.* at 312.

[35] *See* Army Reg. 600-85, Personnel-General: Alcohol and Drug Abuse Prevention and Control Program, app. E (21 Oct. 1988) [hereinafter AR 600-85].

[36] *See* AR 600-85, Glossary.

[37] *See* AR 600-85, Glossary.

Once these witnesses have completed their testimony, the trial counsel, relying upon the presumption of regularity associated with laboratory reports,[38] may offer the laboratory results into evidence. Because the entire laboratory report should have been admitted previously as an appellate exhibit, the trial counsel should now seek permission to introduce into evidence a summary[39] of the laboratory report as proof that the accused used cocaine. The laboratory report qualifies as a business record and is admissible under the business record exception to the hearsay rule.[40] Furthermore, the report does not require an authenticating witness because it is accompanied by an attesting certificate[41] from the custodian of the report.

Conclusion

Not every case will require the presence of the local chain of custody witnesses and evidentiary exhibits. For example, in a judge alone trial, the trial counsel may desire to present a pure paper case. In any event, trying a urinalysis case is not the difficult proposition that many believe. Even when the case is tried using the local chain of custody witnesses, it generally will not take more than half a day to complete. Using judicial notice avoids the burden and expense of expert testimony and makes the trial counsel's job much simpler. Counsel should still be flexible enough to alter the presentation of their case depending on anticipated defenses. As a general rule, however, the procedures outlined in this article will be sufficient to obtain convictions in most urinalysis cases.

Appendix

UNITED STATES
v.
JOHN E. DOE
PV1, US ARMY
111-00-2334

FORT HOOD, TEXAS

GOVERNMENT REQUEST FOR JUDICIAL NOTICE

Comes now the United States in the above titled case, by and through the undersigned Trial Counsel, and requests this honorable Court take judicial notice of the following facts:

a. The drug cocaine is derived from the coca plant. When cocaine is inhaled or ingested into the human body, the body's metabolic process converts cocaine into various metabolites (break down particles), which are then excreted in the urine. The primary metabolite found in human urine after cocaine use is benzoylecgonine. Benzoylecgonine is not naturally produced by the human body or by any other substance other than cocaine.

b. Benzoylecgonine can be conclusively identified through a properly conducted radioimmunoassay (RIA) screening test followed by a gas chromatography/mass spectrometry (GC/MS) confirmatory test of a urine sample. The Air Force Drug Testing Laboratory at Brooks Air Force Base, Texas, utilizes the radioimmunoassay (RIA) screening test followed by a gas chromatography/mass spectrometry (GC/MS) confirmatory test.

Respectfully Submitted,

MICHAEL J. DAVIDSON
CPT, JA
Trial Counsel

I certify that a copy of this request for judicial notice was served on opposing counsel on the ___ day of _____, 1990.

MICHAEL J. DAVIDSON
CPT, JA
Trial Counsel

[38] United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979).

[39] A summary of the report may consist of the chain of custody document and front page of the laboratory report, which will be a short, concise statement of the laboratory's findings. This summary should be admissible as a summary under Mil. R. Evid. 1006. This procedure is recommended so as to preclude confusing the court members with the numerous graphs and charts which will not be explained at trial.

[40] Mil. R. Evid. 803(6). *See* United States v. Holman, 23 M.J. 565 (A.C.M.R. 1986) (handwriting analysis); United States v. Cordero, 21 M.J. 714 A.F.C.M.R. 1985) (laboratory report).

[41] Mil. R. Evid. 902(4a).

Due Diligence in Obtaining Financial Records

Captain Donald W. Hitzeman
Trial Counsel Assistance Program

The constant expansion of automated data processing in the field of recordkeeping has yielded a vast quantity of information for investigators and prosecutors, and has led to many convictions. Criminals involved in racketeering, money laundering, drug dealing, procurement fraud and, more recently, securities fraud, have met their demise as the result of government investigation of financial records. In the military context, investigators and trial counsel may wish to gain access to an individual's financial records for a variety of reasons. Such records may be relevant to investigating bad check cases, drug distributions, larcenies, misuse of frequent flyer accounts, or frauds involving travel claims, credit cards, procurement, government contracts, or other claims against the United States. For the unwary and uninformed prosecutor, however, ignorance of the proper means of timely obtaining these records could result in a failed prosecution, either at trial or on appeal.[1]

While the government has access to such records for proper investigative purposes, it must first overcome a statutory presumption that these records are confidential. This presumption was established by Congress in the Right to Financial Privacy Act.[2] Many of the act's provisions set forth the prerequisites for government access to such records.[3] These include the customer's authorization,[4] administrative subpoena or summons,[5] search warrant,[6] judicial subpoena,[7] or formal written request.[8] Unfortunately, the requirements of the act are filled with technical pitfalls for the unwary. Except customer consent, each of these means of access requires notice to the customer,[9] and most provide an opportunity to challenge disclosure of the records in an appropriate federal district court or in the court that issued the judicial subpoena.[10] Failure to comply with these "notice and challenge" provisions may subject the offending government agency or financial institution to civil penalties, actual and punitive damages, and attorneys' fees and costs.[11] Additionally, if it is determined that an agent or employee of the United States willfully or intentionally failed to comply with the act, he or she may be subject to disciplinary action.[12]

Military investigators and prosecutors must know not only the provisions of the Right to Financial Privacy Act, but also certain regulations governing the obtaining of financial records. Among these are Army Regulation 190-6 and CID Regulation 195-1.[13] Both regulations implement the requirements of the Right to Financial Privacy Act by providing detailed guidance on seeking records within the United States. Further, they set forth different procedures for accessing financial records

[1] The requested records may be withheld by the financial institution for noncompliance with the Right to Financial Privacy Act, 12 U.S.C. § 3403(b). *See infra* notes 4-12 and accompanying text. The Army Court of Military Review has, however, held that where the records are obtained, failure to comply with the act will not render the records inadmissible. United States v. Jackson, 25 M.J. 711, 713 (A.C.M.R. 1987), *petition denied*, 27 M.J. 1 (C.M.A. 1988) ("Neither the statute nor the regulation provides for an exclusionary rule").

[2] 12 U.S.C. § 3401-3422 (1982). The limited access and confidentiality of these records is set forth at 12 U.S.C. § 3402-3403.

[3] This note will not discuss each detail of the Right to Financial Privacy Act as an excellent treatment of the specifics of the act has already been authored. *See* Hutton, *The Right to Financial Privacy Act: Tool to Investigate Fraud and Discover Fruits of Wrongdoing*, The Army Lawyer, Nov. 1983, at 10. As the act has been amended in only minor respects since that article was published, it continues to be timely and useful for the prosecutor and investigator.

[4] 12 U.S.C. § 3404 (1982).

[5] *Id.* § 3405.

[6] *Id.* § 3406.

[7] *Id.* § 3407.

[8] *Id.* § 3408.

[9] As to search warrants issued pursuant to the Federal Rules of Criminal Procedure, customer notice must be mailed within 90 days of service on the financial institution. 12 U.S.C. § 3406(b) (1982).

[10] *Id.* § 3410.

[11] *Id.* § 3417(a).

[12] *Id.* § 3417(b).

[13] Army Reg. 190-6, Obtaining Information from Financial Institutions (15 Jan. 1982) (IC101 9 Apr. 1990) [hereinafter AR 190-6]; CID Reg. 195-1, CID Operations, para. 5-35 (1 Nov. 1986) (C1, 1 Apr. 1989) [hereinafter CIDR 195-1].

maintained overseas, because the Right to Financial Privacy Act does not apply to such records.[14]

As noted earlier, the prosecutor or investigator who attempts to access these documents without a full understanding of the Right to Financial Privacy Act risks losing the conviction. A recent example of such a result is found in the Army Court of Military Review's decision in *United States v. Byard.*[15] In the context of a speedy trial issue, the court addressed some of the pitfalls encountered by the government as it attempted to investigate and prosecute a case built on evidence from financial records.

Prior to trial, the government sought a continuance for the purpose of obtaining bank records that the trial counsel indicated could not be obtained at an earlier date. The continuance was requested until the conclusion of a companion case.[16] The continuance was granted over defense objection, and the military judge "entered an advisory ruling that the period would be excluded pursuant to Rule for Courts-Martial 707(c)(5)(A)" without making any findings of fact.[17] The accused later moved to dismiss all charges, alleging he had been denied a speedy trial under the Rules for Courts-Martial.[18]

During litigation of the speedy trial motion, the trial counsel who had earlier been granted the continuance testified "that the financial records sought by the Government were essential to a successful prosecution of the case" and that trial counsel had acted with "due diligence" in obtaining subpoenas for the records on 5 March 1986.[19] The military judge then asked why the government was unable to obtain the records earlier. As recounted by the Army court, the trial counsel's reply reveals serious flaws in the government's attempt to comply with the requirements of the Right to Financial Privacy Act. Trial counsel

> testified that, although he had been attempting since August of 1985 to obtain these records, the appellant had refused to consent to their release, the United States Attorney had refused to issue subpoenas on the prosecutors' behalf, and the financial institutions refused to release the records without either appellant's consent or a court order. [Trial counsel] represented to the military judge that the trial court and prosecutors had no power to issue a subpoena prior to referral on 28 February and stated under oath: "The government is aware of no other mechanism for getting those records."[20]

On the basis of these representations, the military judge granted the government a fifty-eight-day exclusion from government accountability.

On appeal before the Army court, the question of alternative means of obtaining these financial records was explored. To answer this question, the court "ordered a limited evidentiary hearing on various questions of fact arising from the power of the Department of Defense Inspector General (DOD IG) to issue subpoenas pursuant to the Inspector General Act of 1978, 5 U.S.C. App. 3 sec. 6(a)(4) (1982)."[21] Following this hearing, the military judge found that the DOD IG subpoena "was a

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[14]The act defines "financial institution" to include

> any office of a bank, savings bank, card issuer ... industrial loan company, trust company, savings and loan, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, *located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands* ....

12 U.S.C. § 3401(1) (1982) (emphasis added). AR 190-6, para. 1-2b, states, in pertinent part: "The provisions of 12 U.S.C. 3401 et seq. do not govern obtaining access to financial records maintained by financial institutions located outside of" those areas enumerated in section 3401(1). AR 190-6, para. 2-4d, states that access to financial records maintained by overseas military banking contractors or other financial institutions operating on military installations outside the territory of the United States "is preferably obtained by customer consent." Absent consent or where obtaining consent would be inappropriate, a search authorization should be obtained in accordance with Army Regulation 27-10. As to foreign financial institutions, law enforcement agencies "will comply with local foreign statutes or procedures governing such access." *See also* CIDR 195-1, para. 5-35(m).

[15]29 M.J. 803 (A.C.M.R. 1989).

[16]*Id.* at 804. The companion case was United States v. Longhofer, 29 M.J. 22 (C.M.A. 1989).

[17]29 M.J. at 804. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707(c)(5)(A) [hereinafter R.C.M.], provides for exclusion of delays to obtain "substantial evidence" which is both unavailable and necessary, where the government has exercised due diligence in attempting to obtain the evidence and there is reason to believe it will become available in a reasonable period.

[18]R.C.M. 707(a).

[19]29 M.J. at 805.

[20]*Id.*

[21]*Id.* As noted by the court, between September 1983 and 21 March 1986 (the date of the hearing on the speedy trial motion), 43 DOD IG subpoenas had been obtained by the Army Criminal Investigation Command (CID), 89 by the Naval Investigative Service, and 43 by the Air Force Office of Special Investigations. The author notes, however, that restrictions apply to issuance of DOD IG subpoenas in certain classes of cases. Early coordination with the CID region judge advocate will clarify the availability of this subpoena power for a given case. *See* CIDR 195-1, para. 5-33(d)(3).

feasible means to obtain sooner the records sought by the Government," that the prosecutors "had actual knowledge of the DOD IG subpoena power no later than December 1985," that the government "made an affirmative decision not to use the DOD IG subpoena power to obtain the records," and that the trial counsel, then MAJ M., "intentionally failed to apprise the military judge [at trial] of the existence of the DOD IG subpoena power 'because to do so risked losing [this case] on speedy trial issues.'"[22]

The Army court concluded that there were, in addition to those attempted by the trial team, actually two more options to obtain the financial records in this case: 1) the DOD IG subpoena power;[23] and 2) the trial team's power to subpoena records for production at a prereferral deposition.[24]

The court noted that one of the prerequisites for a speedy trial exclusion under R.C.M. 707(c)(5)(A) is due diligence on the government's part in obtaining the evidence. The court stated: "The trial team's ignorance of the availability of DOD IG subpoenas prior to December 1985, even if 'honest and reasonable,' affords no basis for concluding that the Government exercised due diligence. *The Government's ignorance of the availability of DOD IG subpoenas constitutes negligence in itself.*"[25] Having concluded that the trial team had actual knowlege of the DOD IG subpoena power, the court held that the government's tactical decision to forgo use of that power negated the due diligence requirement for exclusion of that period from accountability.[26] Further, because the trial team failed to exercise its power to subpoena these records for a deposition before referral of the charges, it again failed to establish due diligence on its part. The result for the government was a harsh one—dismissal of the principal charges.[27]

Interestingly, the *Byard* court found that the "evidence of record indicates that the government's decision was premised upon a calculated estimate of the time required for referral against its desire to avoid involving the [DOD IG] and *its desire to avoid the requirements of the Right to Financial Privacy Act of 1978.*"[28] The theory of the prosecution team was apparently to issue trial counsel subpoenas after referral and thereby avoid the notice and challenge provisions. The act does not apply "when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties."[29] The Army regulation, however, required that each time a judicial subpoena was issued, the government must comply with the notice and challenge provisions of the act.[30] It is thus questionable whether the trial team's strategy would have succeeded in light of the regulation's mandate. A December 1987 interim change to the regulation has since amended that provision to bring Army practice in line with federal practice under the act.[31]

If *Byard* provides any lesson in this area, it is that an unexpected delay in referral or in the financial institution's production of the subpoenaed records may not be excludable time when other options to obtain the records sooner were not pursued. As the Army court concluded, ignorance of the law and of the means of obtaining financial records is no excuse for lack of due diligence in prosecuting the case. Every prosecutor and investigator involved in a case requiring evidence from financial records should read and be familiar with the Right to Financial Privacy Act and the regulations implementing it. At a minimum, consideration must be given to all possible options in obtaining these documents as early as possible. These include: obtaining customer consent, DOD IG subpoenas, subpoenas for pretrial depositions, judicial subpoenas issued by a federal magistrate or judge, or the formal request procedure. Each of these is available prior to referral of the charges, but will require compliance with the notice and challenge provisions before the records may be obtained. While complying with these provisions may initially be viewed as burdensome, early compliance will yield the needed evidence and avoid potentially harsh results for the government later.

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[22] 29 M.J. at 805 & n.9.

[23] Characterized as an administrative subpoena pursuant to 12 U.S.C. § 3405 (1982).

[24] 29 M.J. at 806-07. *See* R.C.M. 703(e)(2)(B) and Uniform Code of Military Justice article 46, 10 U.S.C. § 846 (1982). It appears that the court envisions a personal subpoena to the financial institution's custodian of records to compel production of the accused's financial records. Subpoenas directed to the accused may have self-incrimination implications. *See* United States v. Doe, 465 U.S. 605 (1984).

[25] 29 M.J. at 806 (emphasis added).

[26] *Id.* at 806-07.

[27] *Id.* at 807.

[28] *Id.* at 806 n.12 and accompanying text (emphasis added). Note 12 of the opinion reflects the "notice and challenge" requirements that apply to DOD IG subpoenas.

[29] 12 U.S.C. § 3413(e) (1982). Federal Rule of Criminal Procedure 17(c) provides for issuance of subpoenas for production of documentary evidence. An open question is whether a trial counsel subpoena issued after referral is one issued "under ... comparable rules of other courts" for purposes of this exception.

[30] AR 190-6, para. 2-5b. The definition of judicial subpoena included trial counsel subpoenas issued pursuant to the Manual for Courts-Martial, United States, 1969, paragraph 115.

[31] AR 190-6, Interim Change 101, 16 Dec. 1987. That change provided that paragraph 2-5b would be superseded by a new subparagraph citing the 1984 Manual provisions and further providing: "The notice and challenge provisions of 12 USC 3407 and 3410 will be followed only when a subpoena is issued pursuant to Rule for Courts-Martial 703(e)(2), either prior to referral to court-martial or for a court of inquiry." This change expired on 16 December 1989. On 9 April 1990, a new Interim Change 101 containing identical language was ordered. It expires on 9 April 1992.

Clerk of Court Notes

Accused's Copy of the SJA's Post-Trial Recommendation to the Convening Authority

On 1 April 1990, Rule for Courts-Martial 1106(f) was amended to require that each accused receive a personal copy of the staff judge advocate's recommendation to the convening authority. The accused's copy may be given to the defense counsel when it is impractical to serve the recommendation on the accused or when the accused so requests. When substitute service is used, however, "a statement shall be attached to the record explaining why the accused was not served personally."

Records of trial are arriving at the U.S. Army Judiciary for appellate review or examination without the required statement—indeed without any documentation at all concerning delivery of the accused's copy of the recommendation. When substitute service is required, the provisions of R.C.M. 1106 must be followed.

In addition, the Clerk of Court continues to receive some records of trial in which there is no receipt by the accused for a copy of the record of trial itself and in which page 3 of the record, DD Form 490, October 1984, has not been completed to certify that a copy was either sent to the accused or delivered to the accused's counsel.

Those who may believe these minor oversights do not cause appellate problems are advised to read the decision of the U.S. Court of Military Appeals in *United States v. Cruz-Rios*, 1 M.J. 429, 432 (C.M.A. 1975), and then "Shepardize" headnote 2 of that decision in Shepard's Military Justice Citations for insight as to how many other cases have involved the same problem. Whenever there is error, the appellate courts must test for prejudice. *See, e.g., United States v. Lee*, 22 M.J. 767, 770 (A.F.C.M.R. 1986; U.C.M.J. art. 59(a), 10 U.S.C. § 859(a) (1982).

Appellate Rights Advisement

We are noticing in some records of trial an "Appellate Rights Advisement" evidently tailored for general court-martial cases in which the approved sentence suggests that the record will be examined by The Judge Advocate General rather than reviewed by the U.S. Army Court of Military Review. The ones we have seen to date are defective in two respects.

First, they lack the advice and understanding that, "if my case is referred to the United States Army Court of Military Review, I have the right to be represented before that Court ... by Appellate Defense Counsel" and the accused's accompanying election as to representation by counsel. Therefore, if, upon examination, The Judge Advocate General refers the case to the Court of Military Review, we must burden some office with locating and readvising the accused and obtaining an election as to counsel. This should be done now, at the end of the trial, not later.

Second, the forms include the following statement: "I have been advised that within two years of final action on my case, I may request The Judge Advocate General to take corrective action." That advice is incorrect in two major respects. If, on the one hand, it refers to the two-year period within which an accused may apply for relief pursuant to Article 69(b) of the Uniform Code of Military Justice, that review is precluded by the very fact of prior examination under Article 69(a) of the Code. *See* Clerk of Court Note, The Army Lawyer, Sept. 1989, at 28; and paragraph 3 of DAJA-CL Message 161500z February 1990, subject "Update 7, AR 27-10, Military Justice" (pertaining to AR 27-10, para. 14-3(b)). On the other hand, if the statement is taken as referring to the two-year period during which an accused in any case may petition for a new trial, the period prescribed by Article 73 begins to run (as does the similar period under Article 69(b), mentioned above), not from the date "of final action," but from the date of the action by the convening authority.

Because the convening authority's action is earlier than the final action of the appellate courts or The Judge Advocate General, the two-year petitioning period expires earlier than this erroneous advice suggests.

If the forms used by your office have these defects, stop using them. If you are not sure, send us a copy (or cite us to a record); we will review your form and advise you.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Impersonating an Officer and the Overt Act Requirement

Wrongfully and willfully impersonating certain officials has historically been prosecuted under the general article[1] as a violation of military law.[2] Among the officials thus protected by the UCMJ are commissioned officers, noncommissioned officers, warrant officers, and

[1] Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1982) [hereinafter UCMJ].

[2] *See* Manual for Courts-Martial, United States, 1984, Part IV, para. 86 [hereinafter MCM, 1984]; *e.g.*, United States v. Collymore, 29 C.M.R. 482 (C.M.A. 1960); United States v. Demetris, 26 C.M.R. 192 (C.M.A. 1958); United States v. Kupchick, 6 M.J. 766 (A.C.M.R. 1978).

petty officers.[3] Also protected are certain other government agents and officials, such as special agents of the U.S. Army Criminal Investigation Command (CID).[4] The recent case of *United States v. Frisbie*[5] teaches that the requirements of proof for this offense, including the so-called overt act requirement, will vary depending upon the status of the official being impersonated.

The accused in *Frisbie*, an enlisted airman, was convicted, *inter alia*, of impersonating a commissioned officer on divers occasions.[6] In each instance he allegedly wore the uniform of an Air Force lieutenant. The first occasion occurred in the accused's dormitory room, where the accused was observed by only one other airman. This airman sometimes shared the room with the accused and knew the accused's true rank.[7] Before the accused departed from the room, he covered his uniform with a civilian coat. The evidence did not indicate that anyone else observed the accused wearing a lieutenant's uniform at this time.[8]

The last incident occurred in an off-base shopping mall, where a security policeman who knew the accused clearly saw the accused wearing the uniform and insignia of an Air Force lieutenant.[9] At one point, in fact, the witness passed within ten to fifteen feet of the accused and could read the accused's name tag on his uniform shirt.[10] In neither instance was any evidence presented that the accused used his assumed status to assert authority as an officer or gained any particularized advantage from assuming that identity.

The accused in *Frisbie* argued that the evidence was insufficient to support his conviction for wrongful impersonation of a commissioned officer. He claimed, relying on *United States v. Yum*,[11] that the military crime of impersonation requires that the government prove that he used his assumed status to assert authority as a commissioned officer.[12] Put another way, the accused contended that impersonation has an overt act or pretense of authority requirement—specifically, that the accused acted out the part of the official he impersonated.

The Manual for Courts-Martial lists three elements of proof for the offense of impersonating certain officials.

> (1) That the accused impersonated a commissioned, warrant, noncommissioned, or petty officer, or an agent of superior authority of one of the armed forces of the United States, or an official of a certain government, in a certain manner;
>
> (2) That the impersonation was wrongful and willful;[13] and
>
> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[14]

An aggravated form of the offense, which includes an intent to defraud, requires the allegation of an additional element.[15]

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[3] MCM, 1984, Part IV, para. 86b(1).

[4] *E.g.*, United States v. Yum, 10 M.J. 1 (C.M.A. 1980); United States v. Adams, 14 M.J. 647 (A.C.M.R. 1982) (accused, who impersonated a CID agent, was prosecuted under article 134).

[5] 29 M.J. 974 (A.F.C.M.R. 1990).

[6] *Id.* at 977.

[7] In fact, this other airman thought the accused wore a lieutenant's uniform to collect a bet. *Id.*

[8] A second alleged impersonation occurred outside a base exchange. There, another airman had a fleeting observation of an unidentified person, who could have been the accused, apparently wearing lieutenants' bars on the lapel of a blue uniform raincoat. The military judge did not specify whether his conviction of the accused for impersonating an officer on "divers occasions" included this alleged incident. In any event, the court of review found the evidence unpersuasive as to this alleged impersonation for two reasons. First, the witness' identification of the accused was uncertain. Second, the pertinent Air Force regulation provides that officers wear their metal grade insignia on the epaulets of their raincoat, while enlisted airmen wear their insignia on their collars or lapels. *Id.* (citing Air Force Reg. 35-10, Dress and Personal Appearance of Air Force Personnel, Figure 3-7, note 1 (April 1989)). Thus, the witness, even if he saw the accused outside the exchange, may have mistaken the metal grade insignia of an airman for that of a lieutenant.

[9] *Frisbie*, 29 M.J. at 977-78.

[10] *Id.* at 978.

[11] 10 M.J. 1 (C.M.A. 1980).

[12] *Frisbie*, 29 M.J. at 976.

[13] Willfulness, as used in this context, requires that the accused know that he is impersonating a particular official. *Demetris*, 26 C.M.R. at 194. Accordingly, state of mind defenses, such as voluntary intoxication, may negate guilt. *Id.* at 195; *see generally* Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, 127 Mil. L. Rev. 131, 154 (1990).

[14] MCM, 1984, Part IV, para. 86b. The third element merely reflects the general requirement for all article 134 offenses tried under the first two clauses of that article. *See id.*, Part IV, para. 60b(2); *see generally* TJAGSA Practice Note, *Mixing Theories Under the General Article*, The Army Lawyer, May 1990, at 66.

[15] *See Collymore*, 29 C.M.R. at 483-84. The Manual provides that if intent to defraud is in issue, the following element of proof is inserted as the new third element: "That the accused did so with the intent to defraud a certain person or organization in a certain manner." MCM, 1984, Part IV, para. 86b n.1. This aggravated form of impersonation subjects the accused to a substantially greater maximum potential punishment. The maximum punishment for impersonation with intent to defraud includes a dishonorable discharge, total forfeitures, and confinement for three years. *Id.*, Part IV, para. 86e(1). The maximum punishment for impersonation without an intent to defraud is limited to a bad-conduct discharge, total forfeitures, and confinement for six months. *Id.*, Part IV, para. 86e(2).

The gist of unlawful impersonation under military law was well stated by the Court of Military Appeals nearly forty years ago in *United States v. Messenger.*[16]

> The gravamen of the military offense of impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, but rather upon whether the acts and conduct would influence adversely the good order and discipline of the armed forces. It requires little imagination to conclude that a spirit of confusion and disorder, and lack of discipline in the military would result if enlisted personnel were permitted to assume the role of officers and masquerade as persons of high rank.[17]

Of course, evidence that the accused derived a benefit from the impersonation would be relevant as an aggravating matter on sentencing[18] and might support the accused's conviction for other offenses.[19]

In the *Yum* case, relied upon by the accused, a majority of the Court of Military Appeals did conclude that wrongful impersonation of a CID agent requires that the accused affirmatively act out the part of the official he is impersonating.[20] A careful reading of *Yum* indicates, however, that this particular overt act or pretense of authority requirement is limited to circumstances where the accused is alleged to have impersonated "an agent of superior authority," such as a CID agent.[21] Accordingly, when the accused is alleged to have impersonated one of these officials without an intent to defraud, the specification must allege and the evidence must establish that "the accused committed one or more acts which exercised or asserted the authority of the office the accused claimed to have."[22]

The overt act or pretense of authority requirement for an impersonation offense is applied differently when the accused impersonates a commissioned, warrant, petty, or noncommissioned officer. The Court of Military Appeals has recognized that all these officials fall "within the 'category of persons who under the Manual provisions cannot be impersonated with impunity.'"[23] The military's courts have thus concluded that falsely and publicly representing oneself as a commissioned officer,[24] or falsely and publicly wearing the uniform of a noncommissioned officer,[25] without more, can constitute an impersonation offense under article 134. The Court of Military Appeals explained that because of the unique relationship between "subordinates and superiors [in the military], the adverse impact on good order and discipline of such an impersonation on a military post is self-evident."[26] The courts have concluded, in short, that publicly holding oneself out as a military officer—which can be established simply by publicly wearing the uniform of a military officer—satisfies the overt act requirement for an impersonation offense.

Applying this authority to the evidence in *Frisbie*, the Air Force Court of Military Review found that the first alleged incident of impersonation—when the accused

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[16] 6 C.M.R. 21 (C.M.A. 1952).

[17] *Id.* at 24-25; *see* W. Winthrop, Military Law and Precedents 727 (2d ed. 1920 Reprint) (assuming the rank of a superior—for example, as a lieutenant or captain—is included as a neglect and disorder under the precursor of article 134 without reference to the accused deriving a benefit therefrom).

[18] *See* MCM, 1984 Part IV, para. 86c(1); *see generally* MCM, 1984, Rule for Courts-Martial 1001(b)(4) [hereinafter R.C.M.].

[19] For example, wrongfully obtaining money or the property of another by means of impersonating an official, with the intent permanently to defraud the owner of the money or property of its use and benefit, could constitute larceny under a false pretenses theory. UCMJ art. 121; MCM, 1984, Part IV, para. 46c(1)(e); *see generally* United States v. Carter, 24 M.J. 280, 282 (C.M.A. 1987). Of course, a multiplicity issue as to the impersonation offense and the larceny by false pretenses offense would likely arise. *See generally* United States v. Baker, 14 M.J. 361 (C.M.A. 1983); R.C.M.907(b)(3)(B); R.C.M. 1003(c)(1)(C); R.C.M. 307(c)(4) discussion.

[20] *Yum*, 10 M.J. 1 (C.M.A. 1980); *accord Adams*, 14 M.J. 647 (A.C.M.R. 1982). The court wrote three separate opinions in the *Yum* case. Judge Fletcher, who authored the lead opinion, concluded that more than a bare false representation by the accused that he was a CID agent was required to support his conviction for impersonating an agent of a superior authority. *Yum*, 10 M.J. at 4. Chief Judge Everett concurred in the result, finding that the accused must "to some extent have played the role of the person impersonated" in order to be guilty of this offense. *Id.* at 4, 5 (Everett, C.J., concurring). Judge Cook dissented, concluding that the accused "cloaked himself in the mantle of a CID agent, not as mere puffery of position, but for some special benefit he thought might accrue to him." *Id.* at 6 (Cook, J., dissenting).

[21] The majority in *Yum* relied heavily on United States v. Rosser, 528 F.2d 652 (D.C. Cir. 1976), which interpreted the federal civilian impersonation statute. Under *Rosser*, in order to be guilty under the civilian statute, the accused must affirmatively act out the part of the officer or employee of the United States being impersonated. *Id.* at 656; *see generally* Cooper, *Persona Est Homo Cum Statu Quodam Consideratus*, The Army Lawyer, Apr. 1981, at 17.

[22] MCM, 1984, Part IV, para. 86b n.2; *Yum*, 10 M.J. at 4.

[23] United States v. Pasha, 24 M.J. 87, 92 (C.M.A. 1987) (quoting *Yum*, 10 M.J. at 5 (Everett, C.J., concurring in the result)); *accord* United States v. Reece, 12 M.J. 770, 772 (A.C.M.R. 1981).

[24] *Reece*, 12 M.J. at 772.

[25] *Pasha*, 24 M.J. at 91-92.

[26] *Id.* at 92. Significantly, Chief Judge Everett joined in the quoted language from *Pasha*. Seven years earlier he concurred in the result in *Yum*, which reversed the accused's conviction because the pretense of authority requirement was not satisfied by the accused's impersonation of a CID agent.

wore a lieutenant's uniform in his room in front of his roommate—was not public for purposes of the crime of impersonation.[27] The court noted that the accused's roommate was well aware of the accused's true status and, therefore, did not treat the accused as if he were a commissioned officer. Moreover, the public at large was not exposed to the accused's impersonation. Therefore, the accused's conduct did not prejudice good order and discipline, nor was it service discrediting.

The court reached a different conclusion as to the final incident of impersonation, which occurred at the shopping mall in the civilian community.[28] The court found that the accused's conduct on this occasion was clearly public. The accused wore a lieutenant's uniform in a crowded, public area. There he was observed by numerous people who were unaware of his deception. The court concluded that these actions by the accused fully satisfied the overt act requirement for impersonating a commissioned officer. No additional "acting out" or pretense of authority need be alleged or proven, because "[b]y wearing the uniform and insignia of an officer, [the accused] assert[ed] that he [was] entitled to the respect and courteousies [sic] accorded the status of a commissioned officer by statue [sic], regulation and custom of the service."[29]

The lessons taught by *Frisbee* are obvious. Trial practitioners must be aware of the subtle distinctions among impersonation offenses based upon the status of the official being impersonated. These distinctions must be recognized when drafting and reviewing specifications that allege impersonation offenses. They are also crucial in determining the requirements of proof for this crime. As *Frisbee* clearly illustrates, wrongful and willful impersonation under military law is far more complex and complicated than might first be imagined. MAJ Milhizer.

Overdraft Protection and Economic Crimes

Two recent court of review opinions address whether overdraft and similar protections afforded by financial institutions can shield their service member customers from criminal liability under the Uniform Code of Military Justice.[30] These cases indicate that although such services may negate guilt in some circumstances, they do not automatically insulate a service member's financial misdealings from the reach of military criminal sanctions. Read together, the cases provide that, although formal overdraft protection can negate guilt under some circumstances, a financial institution's unilateral decision to honor a bad check will probably not prevent an accused from being convicted of certain bad check offenses.

In *United States v. McCanless*[31] the accused was convicted, *inter alia*, of wrongful appropriation[32] of over $3000.00 from a credit union.[33] The wrongful appropriation charge related to numerous checks written by the accused on his account, made payable to various payees at the installation.[34] The accused's account expressly provided for overdraft protection.[35] When the accused's account was found to have insufficient funds to cover the checks he had written, the credit union paid the checks and debited the accused's account with the amount of each check.[36] A service charge was also debited. The court of review found that the credit union paid the checks on its own initiative under the provision of the contract that permitted them to do so.[37]

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[27] *Frisbie*, 29 M.J. at 977; *cf.* United States v. Carr, 28 M.J. 661 (N.M.C.M.R. 1989) (defines "public" for purposes of indecent acts).

[28] *Id.* at 978.

[29] *Id.* at 977.

[30] 10 U.S.C. § 801-940 (1982).

[31] 29 M.J. 985 (1990).

[32] A violation of UCMJ art. 121.

[33] *McCanless*, 29 M.J. at 987. The accused was assigned to an air station in Greece where a branch office of the credit union was located. The credit union's main office was in California. The accused's contract with the credit union was based on section 4401 of the California Commercial Code. *Id.* at 987-88.

[34] *Id.* at 988. None of the checks were made payable to the credit union. *Id.*

[35] The overdraft provision provided that the credit union had the option of paying checks when the account had insufficient funds to cover them, treating the payment as a debit against the account holder's account. The credit union was authorized to assess a service charge for such payments. *Id.*

[36] *Id.*

[37] *Id.* The decision to cover the checks was made in part because the branch office at the air station was newly established and had trouble communicating with the main office in California to verify accounts. *Id.*

At one point, the branch manager of the credit union informed the accused that his account was overdrawn. The accused responded by offering false denials and excuses, which the credit union investigated and determined to be untrue. The credit union nonetheless continued to cover the checks and debit the accused's account. The accused did not ask the credit union to pay the checks, nor did he otherwise actively influence it to cover the checks. The accused did admit, however, that he intentionally took advantage of the overdraft protection when writing the checks.[38] Ultimately, the credit union stopped paying the checks and returned them to the payees for insufficient funds. All thirty-eight checks forming the basis for the wrongful appropriation charge were covered by the credit union pursuant to its overdraft protection.[39]

The Air Force Court of Military Review concluded that the accused in *McCanless* was not guilty of wrongful appropriation under these circumstances. The court wrote,

> When a bank or credit union uses its agreement with a customer to extend credit to the customer through the granting of overdraft privileges and does so without relying upon false pretenses or misrepresentation of the customer, there is no wrongful taking, obtaining or withholding of any property.[40]

The court observed that a false pretenses theory[41] of wrongful appropriation was not satisfied because the accused's evasiveness and misrepresentations to the credit union official were not the reason that the accused was provided with overdraft privileges. The court concluded that, at most, the accused took advantage of the overdraft protection extended to him. These actions, however, did not amount to wrongful appropriation under any theory recognized by article 121.[42]

McCanless can be contrasted to the recent case of *United States v. McNeil*.[43] The accused in *McNeil* wrote numerous checks against his bank account.[44] The accused did not receive formal overdraft protection from the bank, nor did he have any similar arrangements with the bank for covering checks having insufficient funds. Nevertheless, the bank paid the majority of these checks, unbeknownst to the accused, because of a temporary policy that it had unilaterally established.[45] The bank eventually stopped paying the checks and returned them to the payees because of insufficient funds.

The Navy-Marine Court of Military Review concluded that the accused in *McNeil* could be convicted of making and uttering the "bad" checks,[46] including those that the bank had honored. The court found that the bank had not agreed or arranged with the accused to extend him credit or overdraft protection.[47] The court observed that when a financial institution unilaterally decides to honor overdrafts, as in *McNeil*, it does not thereby shield its customers from criminal liability under the UCMJ. The court concluded that

> [i]n any event, [the accused's] reliance upon the simple fact of the Bank's payment of his overdrafts as negating an intent to defraud misses the point. It is what the [accused] intended and knew *at the time he made and uttered* the worthless checks which is key, not what action the Bank subsequently took on the overdrafts of its own initiative.[48]

On the other hand, the court in *McNeil* concluded that the accused could not be convicted of dishonorably failing to maintain sufficient funds,[49] a lesser included

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[38] *Id.* at 989.

[39] The checks totaled $3000.36; another $800.00 was debited in overdraft fees. By the time of trial, the accused had repaid $1000.00 of this amount. *Id.* at 988.

[40] *Id.* at 990.

[41] Court of Military Appeals decisions discussing the false pretenses theory of larceny and wrongful appropriation under UCMJ art. 121 include United States v. Carter, 24 M.J. 280 (C.M.A. 1987); United States v. Seivers, 8 M.J. 63 (C.M.A. 1979); and United States v. Cummins, 26 C.M.R. 449 (C.M.A. 1958).

[42] For a discussion of the different theories of larceny and wrongful appropriation embraced by UCMJ art. 121, see generally MCM, 1984, Part IV, para. 46; United States v. Mervine, 26 M.J. 482, 483 (C.M.A. 1988); United States v. Buck, 12 C.M.R. 97 (C.M.A. 1953); TJAGSA Practice Note, *Larceny of a Debt: United States v. Mervine Revisited*, The Army Lawyer, Dec. 1988, at 29.

[43] 30 M.J. 648 (N.M.C.M.R. 1990).

[44] *Id.* at 649. The accused opened his bank account in Okinawa, at a branch office of the National Bank of Fort Sam Houston. *Id.*

[45] Apparently the bank encountered difficulties when it became the contractor providing military banking services and facilities in Okinawa. Accordingly, the bank adopted a temporary policy of paying all checks—even those having insufficient funds—until its computer system stabilized. *Id.*

[46] A violation of UCMJ art. 123a.

[47] The court defined "credit" as being "an arrangement or understanding, express or implied, with the bank or other depository for the payment of the check, draft, or order." *McNeil*, 30 M.J. at 650 (citing MCM, 1984, Part IV, para. 49c(12)).

[48] *McNeil*, 30 M.J. at 650 (emphasis in original).

[49] A violation of UCMJ art. 134; *see* MCM, 1984, Part IV, para. 68.

offense of an article 123a charge,[50] when the bank covered the checks.[51] The court observed that central to the commission of this lesser offense is that the check at issue be dishonored. The customer does not bring discredit upon the armed forces when the check is honored by the bank.[52]

McCanless and *McNeil* are but the latest cases to consider the extent to which overdraft protection and similar financial services can negate criminal liability under the UCMJ.[53] Given the prevalence of these services and widespread use of checking accounts by soldiers, counsel must become familiar with the complex impact of modern banking practices upon traditional economic offenses under military law. MAJ Milhizer.

AIDS and Aggravated Assault

In *United States v. Stewart*[54] the Court of Military Appeals affirmed the accused's conviction for aggravated assault[55] for knowingly exposing a female victim to the HIV virus by repeatedly having unprotected sexual intercourse with her.[56] An expert witness at Stewart's court-martial testified that the victim had contracted the HIV virus by having sexual intercourse with the accused and that the victim had a thirty to fifty percent chance of dying of AIDS.[57]

The court in *Stewart* found that the evidence supported the accused's conviction for aggravated assault under the theory that his assaultive misconduct was a means likely to produce death or grievous bodily harm.[58] The court concluded that a thirty to fifty percent chance of death resulting from the battery inflicted by the accused was sufficient to make AIDS a "natural and probable consequence" of the accused's actions. The court, however, did not indicate at what point the chance of death would be too remote to support a conviction for aggravated assault upon this theory. The court likewise did not decide whether unprotected sexual intercourse with no evidence of transmission of the disease to the victim could constitute a simple or aggravated assault.

These unresolved issues are largely laid to rest by the recent Court of Military Appeals decision in *United States v. Johnson*.[59] After testing positive for the HIV virus, Johnson was evaluated and received out-patient medical treatment at an Air Force medical center.[60] This treatment included extensive counseling about the nature of his condition and the dangers of transmitting HIV. The accused later attempted to engage in unprotected anal intercourse with another male airman whom he had met off-base. The accused, however, never achieved penetration.[61]

The court affirmed the accused's conviction for aggravated assault by a means likely to produce death or grievous bodily harm under an attempt theory of assault.[62] The court defined "likely," for purposes of this offense, as being "at least more than a fanciful,

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[50] *See* MCM, 1984, Part IV, para. 49d(1). For a detailed discussion of check offenses generally, see Richmond, *Bad Check Cases: A Primer for Trial and Defense Counsel*, The Army Lawyer, Jan. 1990, at 3; *see also* TJAGSA Practice Note, *Mens Rea and Bad Check Offenses*, The Army Lawyer, Mar. 1990, at 36.

[51] *McNeil*, 30 M.J. at 651.

[52] *Id.* (citing United States v. Downard, 20 C.M.R. 254 (C.M.A. 1955)).

[53] Earlier cases addressing these and related issues include United States v. Williams, 28 M.J. 736 (N.M.C.M.R. 1989); United States v. Bushwell, 22 M.J. 617 (A.C.M.R. 1986); and United States v. Crosby, 41 C.M.R. 927 (A.F.C.M.R. 1969).

[54] 29 M.J. 92 (C.M.A. 1989). For a discussion of the *Stewart* case, see TJAGSA Practice Note, *Court of Military Appeals Decides AIDS-Related Cases*, The Army Lawyer, Dec. 1989, at 32, 34.

[55] A violation of UCMJ art. 128.

[56] *Stewart*, 29 M.J. at 93. For an interesting discussion of using assault and other offenses against the person to reach AIDS related misconduct, see Schultz, *AIDS: Health and the Criminal Law*, St. Louis U. Pub. L. Rev. 65, 80-97 (1988); *see also* Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, The Army Lawyer, Jan. 1988, at 17, 20-26.

[57] *Id.* at 93-94. More recently, other experts have opined "that 95% to 99% of those persons infected with HIV will develop the AIDS disease eventually." Sinkfield and Houser, *AIDS and the Criminal Justice System*, 10 J. of Legal Med. 103, 105 n.7 (1989), *quoted in* United States v. Johnson, 30 M.J. 53, 55 n.4 (C.M.A. 1990). Moreover, many experts are now projecting that virtually all persons having AIDS will ultimately die of the disease. *See generally* G. Mandell, R. Douglass & J. Bennett, Principles and Practices of Infectious Diseases, chap. 106 (3d ed. 1990).

[58] *See* MCM, 1984, Part IV, para. 54c(4)(a).

[59] 30 M.J. 53 (C.M.A. 1990). *Johnson* is the first case in which the Court of Military Appeals has addressed these issues. The Air Force Court of Military Review discussed these matters in the *Johnson* case below, 27 M.J. 798 (A.F.C.M.R. 1988), and in United States v. Dumford, 28 M.J. 836 (A.F.C.M.R. 1989). For a discussion of the Air Force court's decision in *Johnson*, see TJAGSA Practice Note, *AIDS Update*, The Army Lawyer, Mar. 1989, at 29, 32.

[60] *Johnson*, 30 M.J. at 54.

[61] *Id.* at 54-55. The accused laid his penis in the vicinity of the victim's anus while intending to penetrate him. *Id.* at 55. The accused explained that he later "lost interest" in completing the act after the victim vomited.

[62] UCMJ art. 128 specifically recognizes an attempt theory for assault. The Manual provides that

> An "attempt" type assault requires a specific intent to inflict bodily harm, and an overt act—that is, an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. An attempt type assault may be committed even though the victim had no knowledge of the incident at the time.

MCM, 1984, Part IV, para. 54c(1)(b)(i). As the Manual indicates, more than mere preparation to inflict the harm is required. *See* United States v. Crocker, 35 C.M.R. 725, 731 (A.F.B.R. 1961); *cf.* UCMJ art. 80 and United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (all attempts under article 80 require an overt act that is more than mere preparation). As the Manual also provides, an attempt-type assault requires that the accused have an apparent ability to inflict bodily harm. *See* United States v. Smith, 15 C.M.R. 41 (C.M.A. 1954); United States v. Hernandez, 44 C.M.R. 500 (A.C.M.R. 1971).

speculative, or remote possibility."[63] The court concluded that the evidence satisfied this liberal definition of "likely," finding that "[t]here was some competent evidence ... upon which the military judge could find beyond a reasonable doubt that the [accused] *attempted* to do bodily harm to [the airman], *i.e.*, engage in unprotected anal intercourse which would have been likely to transmit a disease which can ultimately result in death."[64]

Despite the far-reaching importance of *Johnson*, some questions remain unanswered concerning aggravated assault as a means of reaching AIDS-related misconduct. For example, at what point does the chance of transmission of the HIV virus become so remote as to not support a conviction for aggravated assault?[65] What impact, if any, should statistical evidence regarding the risk of transmission have upon the issue of whether the misconduct at question was "likely" to cause death or grievous bodily harm?[66] Can an accused be guilty of aggravated assault if he used barrier protection, regardless of whether his partner was informed by the accused of his diagnosed condition? The answer to these and other important questions await future action by the court. MAJ Milhizer.

Defense Use of DNA Testing

With the exception of identical twins, each human has unique DNA. Proponents of DNA testing claim extremely high accuracy rates in matching questioned DNA samples to known sample sources.[67] A myth has arisen that DNA testing is a case dispositive prosecution tool that blinds the factfinder to all contradictory evidence. With the increasing forensic use of DNA evidence,[68] this myth is being debunked. When faced with this myth as an argument for excluding DNA or other scientific evidence, counsel should consider the case of *State v. Hammond*.[69]

Although the prosecution has made greater use of DNA evidence in identifying criminals, such testing is also available to the defense to exclude the accused as the perpetrator of an offense. *Hammond* represents the first known trial in which an FBI agent testified that DNA testing supported an accused's innocence.

Hammond also indicates that jurors do not ignore other evidence once presented with DNA test results. Although the *Hammond* DNA tests tended to exculpate the accused, the jury convicted the accused based on other available evidence. The victim identified the accused in a photograph array, described a child's car seat in her attacker's car that matched one found in the accused's car, and detailed how her attacker placed his watch on the gearshift when he drove, which was shown to be the accused's habit. The accused also had given various conflicting alibis.

The Military Rules of Evidence generally encourage greater admissibility of evidence, with the factfinder deciding the proper weight to be given a particular piece of evidence. Court members, especially the comparatively better qualified court members found in the military justice system, should not be underestimated; they have the ability to evaluate all of the evidence fairly. MAJ Warner.

Jurisdiction Beyond ETS

The United States Court of Military Appeals has changed the rules applicable to the military retaining court-martial jurisdiction over service members who continue to serve past their expiration of term of service (ETS) date. In *United States v. Poole*[70] Chief Judge Everett, writing for an unanimous court, held "that jurisdiction to court-martial a servicemember exists despite delay—even unreasonable delay—by the Government in discharging that person at the end of an enlistment."[71]

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[63] *Johnson*, 30 M.J. at 57. This definition of "likely" seems broader than the definition found in the Manual, which provides: "When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be inferred that the means or force is 'likely' to produce that result." MCM, 1984, Part IV, para. 54c(4)(a)(ii). The court's definition of "likely" is also broader than that found in other legal sources. *E.g.*, H. Black, Black's Law Dictionary 1076 (4th ed. rev. 1968) ("likely" means "probable" or "in all probability").

[64] *Johnson*, 30 M.J. at 57 (emphasis in original) (citing Jackson v. Virginia, 443 U.S. 307 (1979); United States v. Hicks, 24 M.J. 3 (C.M.A. 1987)).

[65] *See generally* Blumberg, *Transmission of the AIDS Virus Through Criminal Activity*, Crim. Law Bull., Sep.-Oct. 1989, at 454, 456-60 (the chances of becoming infected by a single sexual encounter, even when the victim is attacked by an assailant, is negligible; there are no documented cases of transmission of the HIV virus by rape).

[66] *See generally* Wells-Petry, *supra* note 56, at 24 (criticizing the efficacy of statistical analysis for these purposes).

[67] *E.g.*, In People v. Castro, N.Y. Sup. Ct., Criminal Term SC-4, 1987 Indictment No. 1508, an expert testified that the match of DNA found in sperm at the crime scene with the accused's DNA had a one in ten billion chance of being coincidental.

[68] A good summary of the methodology and theory behind DNA testing can be found in Cobey v. State, Md. Ct. Spec. App., No. 1515-1988 (June 29, 1989), further proceedings in 533 A.2d 944 (Md. 1989), 42 Crim. L. Rep. (BNA) 2213 (1989), digest of opinion at 45 Crim. L. Rep. (BNA) 2289 (1989).

[69] Hartford Superior Court, Part A, No. 54057 (March 26, 1990), *cited in* 4 BNA Criminal Practice Manual 9 (May 2, 1990).

[70] 30 M.J. 149 (C.M.A. 1990).

[71] *Id.* at 151.

Prior to *Poole*, the rules regarding jurisdiction over a service member held past ETS were succinctly stated in *United States v. Fitzpatrick*.[72] The government lost court-martial jurisdiction unless one of three situations applied: 1) prior to the ETS date, the government took some official action that authoritatively signaled its intent to prosecute; 2) after the ETS date, the service member did not object to continued retention; or 3) after the ETS date, the service member objected to the continued retention and the government failed to take official action with a view toward prosecution within a reasonable time.[73]

Apparently, the *Fitzpatrick* rules are no longer valid. Chief Judge Everett has long held the view that court-martial jurisdiction should continue until the service member is actually discharged, even when there had been unwarranted delay in discharging the service member and despite repeated requests for the discharge from the service member. Nevertheless, he never had a majority of the court accepting his view until *Poole*.[74] In *Poole* he indicates that even if the accused had made requests for a discharge, such requests would be immaterial. Literally applying article 2, UCMJ, when it states that the military has jurisdiction over "[m]embers of a regular component of the armed forces, *including those awaiting discharge after expiration of their terms of enlistment*,"[75] Chief Judge Everett stressed that the UCMJ makes no exception for unreasonable delays in effectuating the discharge, and he could see no reason to create one.[76] Thus, only when the service member is actually discharged will court-martial jurisdiction terminate.

For the defense counsel who has a client being held past his or her ETS date, the court lists available options to alleviate the accused's situation: an article 138, UCMJ, complaint; an application to the Board for Correction of Military Records; an application for extraordinary relief to a military appellate court; or a writ of habeas corpus.[77] Also, Chief Judge Everett indicates that an unreasonable retention beyond one's ETS date is a circumstance to be considered in determining whether an accused has been prejudiced by pretrial delays. However, most important to counsel defending an accused being held beyond his or her ETS date is the *dicta* in the *Poole* opinion, which indicates that an unreasonable delay in accomplishing a discharge may affect a service member's obligation to perform some military duties. Apparently, the accused in such a situation would remain subject to court-martial jurisdiction for "civil type" offenses (rape, murder, etc.), but may have a potential defense to some "military type" offenses.[78] Chief Judge Everett gives the example that if a sailor is being held past his ETS over his objection and is ordered to make a long movement with his ship, then the accused *might* have a defense to the lawfulness of the order; however, if the accused merely departs on an unauthorized leave (like Seaman Poole did for three years), no legal excuse would exist for the absence.[79] Ultimately, *Poole* may pose more questions than it answers by not specifying what other "military type" offenses a soldier may have a defense to if held past his or her ETS. MAJ Holland.

Hearsay

When circumstances surrounding the making of an out-of-court statement circumstantially guarantee the trustworthiness of that statement, the law may recognize an exception to the hearsay rule. The "excited utterance" exception[80] assumes that a still-startled speaker, under the stress and excitement of the startling event, lacks the wherewithal to fabricate and must be telling the truth.

United States v. Jones[81] concerns a hearsay statement improperly admitted as "akin to an excited utterance." The statement was made by a woman after being asked why she was crying. She related that her husband had gone into a rage twelve hours earlier and, over the course of several weeks, had become very jealous of her child. Eight months later the husband murdered the child. At the trial, the mother's statement was offered as an "excited utterance."

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[72] 14 M.J. 394 (C.M.A. 1983).

[73] *Id.* at 397.

[74] *Id.* at 397 n.2.

[75] UCMJ art. 2 (emphasis added).

[76] *Poole*, 30 M.J. at 150.

[77] *Id.* at 151.

[78] *Id.*

[79] *Id.* (emphasis added).

[80] Mil. R. Evid. 803(2).

[81] 30 M.J. 127 (C.M.A. 1990).

The Court of Military Appeals found that the statement did not fall within the "excited utterance" hearsay exception. The court noted that the mother's statement came many hours after the startling event, after previous opportunities to speak had passed, and after the resumption of daily routine. Further, the statement came in reaction to a question as opposed to being the impulsive, instinctive reaction contemplated by the Military Rule of Evidence 803(2) exception.

In an educational concurring opinion,[82] Judge Cox suggested that the mother's statement may have been admissible under Military Rule of Evidence 803(24), the residual hearsay exception. He pointed out several hearsay exceptions that did not fit the circumstances of the mother's statement exactly; however, in each of the exceptions cited, an event triggers a statement under circumstances that make the statement trustworthy. Even though the statement was preceded by a question, Judge Cox suggested that one could argue the statement was spontaneous and unsolicited. Further, a number of factors could have been marshalled to show the statement was as reliable and trustworthy as the cited exceptions that were not quite on point. Consequently, a good argument could have been made for admitting the statement under the residual hearsay rule, Military Rule of Evidence 803(24). Counsel must not forget Military Rule of Evidence 803(24) when in possession of seemingly reliable hearsay statements that do not meet other hearsay exceptions. MAJ Warner.

Contract Law Note

"Qui Tam" Suits by Government Employees—Maybe

VSI Corporation, a subsidiary of Fairchild Industries, recently pleaded guilty to falsifying test data on a government contract and agreed to pay $18 million in damages, civil penalties, criminal fines, and costs of prosecution.[83] Of the $18 million settlement, $14.5 million will be paid to settle the civil False Claims Act case. The qui tam plaintiffs who initiated the civil suit will receive a minimum of $2.175 million of the $14.5 million settlement.[84] While the plaintiffs in this case were not current or former government employees, knowledge of such a large recovery may present practitioners with the issue of whether government employees may bring qui tam actions based on information acquired pursuant to their duties in hopes of sharing an equally large recovery. Two decisions, based on similar facts, have reached different conclusions on this issue.[85]

The False Claims Act[86] includes a provision that allows individuals who possess evidence of fraud against the government to bring actions in their own names on behalf of themselves and the government (so-called qui tam suits).[87] Once the government is served with notice of such a suit, the U.S. Attorney General has sixty days in which to decide whether to prosecute the case in the name of the United States.[88] If the government proceeds with the case, the qui tam plaintiff is entitled to at least fifteen but not more than twenty-five percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the plaintiff substantially contributed to the prosecution of the case.[89] The statute bars four groups of qui tam suits,[90] including suits based upon the public disclosure of allegations or transactions in an administrative investigation or a public proceeding, unless the suit is brought by the U.S. Attorney General or the person who is an original source of the information. As mentioned earlier, two courts have reached opposite conclusions on the issue of whether these qui tam provisions of the False Claims Act prohibit government employees from bringing qui tam suits based upon information obtained in the course of their employment.

In *Erickson ex rel. United States v. American Institute Biological Science*[91] the qui tam plaintiff's government job involved administration of a government contract with a private laboratory. While performing his job, the plaintiff discovered contract violations, which he reported to his supervisor. When the agency failed to pursue the matter, the plaintiff filed a qui tam suit. The court

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[82] *Id.* at 131-33.

[83] 53 Fed. Cont. Rep. (BNA) 743 (21 May 1990).

[84] 31 U.S.C.A. § 3730(d)(1) (West Supp. 1990); *see infra* text accompanying note 89.

[85] The suits were dismissed on other grounds, but both courts went on to discuss whether the plaintiffs in each case, both former government employees, could bring the actions.

[86] 31 U.S.C.A. § 3729-3733 (West Supp. 1990).

[87] *Id.* § 3730.

[88] *Id.* § 3730(b)(2). A qui tam suit is first served on the government. It is filed *in camera* and remains under seal for sixty days. Within this sixty day period, the government has the option to intervene and take over the prosecution of the case.

[89] *See supra* note 84.

[90] 31 U.S.C.A. § 3730(e)(1)-(4) (West Supp. 1990), bars the following groups of suits: 1) suits between members of the armed forces; 2) suits against members of Congress, the judiciary, or senior executive branch officials if the action is based on evidence or information known to the government when the action is brought; 3) suits based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the government is already a party; and 4) suits based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

[91] 716 F. Supp. 908 (E.D. Va. 1989). The qui tam suit was dismissed because the plaintiff failed to comply with certain filing requirements.

noted that the statute does not directly address whether government employees may maintain qui tam suits; the statue merely bars certain groups of suits.[92] The court held that the plaintiff's suit did not fall within an excluded group and, furthermore, that the plaintiff's suit was not barred by 31 U.S.C. § 3730(e)(4) because the plaintiff was the "original source" of the information.[93] The court also relied on the False Claims Act's "whistleblower" protection provision to support its conclusion that suits by government employees were not barred.[94] The court noted that the term "employer" in the whistleblower provision was intended to include public and private entities. The court held, therefore, that government employees were meant to be included in the class of people from which Congress wanted help in combatting fraud.

In *U.S. ex rel. LeBlanc v. Raytheon Company,*[95] which had a similar factual situation, a district court in the First Circuit held that the False Claims Act bars qui tam suits by government employees based upon information acquired in the course of their employment. The case specifically concerned a former government employee, but the rationale of the opinion appears to be equally applicable to both present and former government employees. The plaintiff was a former Department of Defense quality assurance specialist stationed at the government contractor's plant. In performing his duties, the qui tam plaintiff allegedly observed several violations by the contractor's employees in their handling of government contracts. He reported these violations to his superiors and appropriate actions were taken.

The *LeBlanc* court agreed with the conclusion in *Erickson* that the False Claims Act was specifically amended in 1986 to allow all persons to sue unless their action fell within one of the excluded groups of suits.[96] The *LeBlanc* court concluded, however, that plaintiff's suit was excluded by 31 U.S.C. § 3730(e)(4) because it involved a "public disclosure" and the plaintiff could not qualify as an "original source." A public disclosure occurs, according to the court, whenever government employees use government information learned on the job to file a qui tam suit because they are arms of the government while at work. Furthermore, the court held that a *former* government employee, whose job it is to uncover such information, cannot qualify as an "original source" because he is not someone with "independent knowledge" of the information and because he does not "voluntarily" provide the information to the government. Because gaining the information was a condition of his employment, the fruits of the plaintiff's efforts belonged to the government. Therefore, the court held that the plaintiff did not have "independent knowledge" of the information apart from the government and that he did not "voluntarily" report the information because such action was required of him.

The *LeBlanc* court discussed the competing policy goals underpinning qui tam suits by government employees. The court stated that lawsuits by government employees based on information they obtain solely through their employment can be characterized as "opportunistic." Qui tam plaintiffs would profit from information that they had obtained at the taxpayers expense; as such, they receive double compensation for the same work in the form of their government salary and the qui tam recovery. Allowing these "parasitical" suits, the court observed, would add nothing to the enforcement of anti-fraud laws because it is the government, not the government employee, who discovers the fraud.

It should be noted that the *LeBlanc* decision only dealt with the situation where the government employee has a duty to report the information upon which a qui tam suit is based. The threshold question in any case is whether the government employee has a duty to report the suspected fraud as a condition of employment. There is no general duty on government employees to report crime. As such, if the government employee is not responsible for the particular contract or does not learn about the information pursuant to his official duties, he or she has no duty to report it. Under these circumstances, a government employee could go forward with a qui tam suit provided all the other statutory requirements are met.

A False Claims Act amendment or a ruling by a higher tribunal is needed to resolve the inconsistency between the *Erickson* and *LeBlanc* decisions concerning whether government employees may base qui tam actions on information discovered in the course of their employment. Such an amendment or ruling should delineate the

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[92] *See supra* note 90.

[93] 31 U.S.C.A. § 3730(e)(4)(B) (West Supp. 1990) defines "original source" as an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing an action under this section which is based on the information.

[94] *Id.* § 3730(h). Generally, this section provides that any employee who is in any manner discriminated against in terms and conditions of employment by his or her employer because of lawful acts done in furtherance of an action under this section may bring an action for the relief provided in this section.

[95] 729 F. Supp. 170 (D. Mass. 1990). The qui tam suit was dismissed for lack of jurisdiction because it did not present an actual case or controversy.

[96] Prior to the 1986 amendments to the False Claims Act, 31 U.S.C.A. § 3730(d) (1983) prohibited qui tam suits based on evidence or information the government had when the action was brought. This provision was amended because the jurisdictional bar was considered too broad. *LeBlanc*, 729 F. Supp. at 174 n.8.

guidelines within which both present and former government employees may file qui tam suits. LTC Jose Aguirre & CPT David Wallace.

International Law Note

Center for Law and Military Operations Symposium

The first Center for Law and Military Operations Symposium was held at The Judge Advocate General's School from April 18th through April 20th. The symposium was attended by sixty participants representing the Army, Navy, Marine Corps, Air Force, Coast Guard, Department of Defense, and Department of State.

The Center for Law and Military Operations was established by then Secretary of the Army, John O. Marsh, Jr., in December 1988. The goal of the Center is to examine both current and potential legal issues attendant to military operations through the use of symposia, the publication of professional papers, and the offering of access to a joint service operational law (OPLAW) library. The Center not only prepares attorneys to deal with operational legal issues as they exist, but also, as a concurrent function, attempts to anticipate future deployments in military operations—ensuring the identification, discussion, and implementation of those legal doctrines essential to evolving missions in the field. Additionally, in his directive to The Judge Advocate General of the Army, Secretary Marsh emphasized the invaluable contribution the Center could make to the development of close professional relationships between U.S. and allied attorneys in the OPLAW arena.

Accordingly, for the Center's first symposium, Colonel David Graham, the Director of the Center for Law and Military Operations, called together leading experts in the OPLAW arena to conduct extensive discussions on selected legal issues from a joint perspective. Welcoming remarks at the symposium were delivered by the Commandant, Colonel Thomas Strassburg. Opening remarks were delivered by Brigadier General John Fugh, the Assistant Judge Advocate General for Civil Law. In his remarks, General Fugh stressed the increasing importance of operational law (OPLAW) and the role of the newly established Center in "the ongoing examination of legal issues associated with ... the conduct of military operations." General Fugh noted that this role is part of the Center's mission and that this first symposium embarked on the fulfillment of that mission from a joint service perspective.

The first day of the symposium was devoted to two major subjects. First, representatives from the Army, Navy, Marine Corps, Air Force, and Coast Guard presented a detailed overview of their services' perspectives on OPLAW. Next, psychological operations were addressed. On the second day, the topics included Operation Just Cause, the legal issues associated with the transitions occurring in Europe, and an extensive review of the Department of Defense counternarcotics mission. The counternarcotics discussion focused on the provision of DOD support to both domestic and foreign law enforcement agencies, fiscal law issues, and use of force. The symposium concluded on the final day with an overview of the negotiation and conclusion of international agreements.

In closing the symposium, Colonel Graham stressed the importance of viewing OPLAW from a joint perspective, acknowledged the receipt of various OPLAW materials provided by the participants to the CLAMO library, and stressed the importance of developing the Center as the primary source for joint OPLAW materials.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Tax Notes

Executive Officials May Be Entitled to Deferral of Gain

A little known provision of the Ethics Reform Act[97] may provide tax relief for federal employees who are required to sell capital assets to comply with conflict of interest laws or regulations. The new legislation adds section 1043(a) to the U.S. Code. The new section allows "eligible persons" to elect to defer gain from the sale of property pursuant to divestiture certificates.

A divestiture certificate is a written determination stating that divestiture of specific property is reasonably necessary to comply with any federal conflict of interest statute, regulation, rule, or executive order, or is requested by a congressional committee as a condition of confirmation. The statement should be issued by the President or the Director of the Office of Government Ethics, and should identify the specific property to be divested.

Persons eligible for deferral include all officers and employees of the executive branch of the Federal Government except special government personnel as defined in section 202 of title 18, U.S. Code. The legislation also

[97]Pub. L. No. 101-194, 103 Stat. 1755 (1989).

permits deferral if the spouse or a minor child of a federal employee is the owner of the asset being sold.

Section 1043 operates much like section 1034 of the Code dealing with deferral of gain on the sale of a principal residence. Under section 1043, gain from a divestiture sale must be recognized to the extent that the amount realized on the sale exceeds the cost of any permitted property purchased to replace the asset. The replacement period is limited to sixty days. The basis of the replacement property must be reduced by the gain that has been deferred.

To be eligible for deferral of gain under section 1043, the eligible person must purchase "permitted property." Permitted property includes any obligation of the United States or any diversified investment fund approved by regulations issued by the Office of Government Ethics.

Unlike section 1034, section 1043 allows eligible employees to elect to recognize gain on the sale of a capital asset even if all of the requirements of the Code have been satisfied. Eligible taxpayers may take advantage of section 1043 for any qualifying sale that took place after November 30, 1989, the effective date of the Ethics Reform Act. MAJ Ingold.

Final Regulations Issued on Abatement of Penalty Because of Erroneous IRS Advice

The Treasury Department has issued final regulations relating to the abatement provisions of the Code that were added as part of the Taxpayer's Bill of Rights.[98] The new regulations give guidance on the definition of "advice" and set forth the procedures a taxpayer must follow to obtain an abatement.

As a result of the Taxpayer Bill of Rights, the Internal Revenue Service (IRS) is required to abate any portion of a penalty or addition to tax that is attributable to erroneous written advice given to a taxpayer by an IRS employee or officer.[99] Three conditions must be satisfied to qualify for abatement under this provision. First, the taxpayer must have reasonably relied on the written matter. Second, the advice must have been given in response to a specific request from the taxpayer. Finally, the penalty must not have resulted from the taxpayer's failure to provide accurate or adequate information to the IRS.

The regulations recently issued by the IRS elaborate on these requirements. Under the new regulations, a written response will be considered advice only if the response applies tax law to specific written facts submitted by a taxpayer. The response must provide a conclusion regarding the tax treatment to be accorded based on the application of the law to the facts.

The new regulations also address the critical requirement in section 6404 that the taxpayer reasonably relied on the advice by specifying the types of reliance that will not be considered reasonable. Reliance on written advice will not be reasonable if the advice is given after the taxpayer has filed a return. If the advice is not based on a return item, reliance will not be reasonable if the taxpayer takes action before the advice is received. If the advice concerns a continuing series of actions, the taxpayer may reasonably rely on written advice until the taxpayer is put on notice that the advice is no longer valid. Notice is correspondence from the IRS, legislation, a Supreme Court decision, temporary or final regulations, or any statement published in the Internal Revenue Bulletin.

The regulations also describe what liabilities will be considered penalties and additions to tax. The regulations clarify that any interest imposed on a penalty or addition to tax will be considered a "penalty" qualifying for abatement.

A taxpayer seeking an abatement should file Form 843 to the IRS Service Center where the return was filed. The taxpayer should include copies of the written inquiry to the IRS, the erroneous advice rendered by the service, and the report of the tax adjustment showing the penalty or addition to the tax. The request must be filed within the period allowed for collecting the penalty. MAJ Ingold.

Estate Planning Note

Integrating Insurance Proceeds Into Estate Plans

Life insurance is often the largest asset owned by soldiers. Unfortunately, it is frequently ignored when estate plans are developed. Carelessly considered beneficiary designations may cause haphazard estate plans, increase delays in distributing proceeds, and promote shrinkage of benefits due to claims of tax collectors and creditors. Clients who have established living trusts or testamentary trusts for the benefit of minor children should be particularly concerned that insurance beneficiary designations are consistent with their overall testamentary goals.

Insurance policy owners generally have four options available for distribution of proceeds. The most common method is merely to make the proceeds payable directly to a named individual. A second option is to pay the

[98] Treas. Reg. § 301.6404-0, -3.

[99] I.R.C. § 6404(f) (West Supp. 1990).

proceeds directly to the insured's estate. Another alternative is to pay the proceeds to the trustee of a living or life insurance trust. The final option is to pay the proceeds to the trustee of a testamentary trust.

Payment of insurance proceeds directly to a named beneficiary is obviously the most simple and inexpensive arrangement. Direct distribution should be considered whenever the named beneficiaries are mature adults. If the beneficiary is inexperienced in handling large sums of money, the insured may consider selecting a settlement option that provides payments in installments.[100] Because this method of payment avoids probate, it is a quick way to pass proceeds to beneficiaries and provide liquidity to an estate.

Payment of the proceeds directly to the estate of an insured has several drawbacks. First, federal estate taxes will be assessed on all proceeds payable to an estate even if the decedent did not possess an incident of ownership.[101] State death taxes may also be higher if proceeds are paid to an estate rather than directly to a named beneficiary. Insurance proceeds paid to an estate will also increase the cost of probating the estate and delay distribution of the proceeds to beneficiaries under the will. A final disadvantage is that payment of insurance to an estate will generally subject the proceeds to the claims of the decedent's creditors.[102]

Although there are considerable disadvantages with paying the proceeds to an estate, the alternative may be useful when the insured's debts are likely to exceed the liquid assets in the estate. The insurance proceeds may be used by the executor to pay claims without having to sell items of property that the testator desires to give in-kind.

Many of the disadvantages associated with naming the estate as the beneficiary can be averted by having the proceeds payable to an insurance trust or an inter-vivos trust. This form of payment avoids probate and therefore reduces the cost of administration of the estate. Payment of insurance proceeds to a trust may also be used to avoid claims of creditors of the insured's estate in many states. Payment of proceeds into a revocable trust will not, however, avoid federal estate taxes. To avoid inclusion of proceeds in the gross estate, the insured must relinquish all incidents of ownership over the policy and, if the proceeds are payable to a trust, it must not be revocable by the insured.

An estate planning device wealthy clients should consider is a revocable trust to serve as a receptacle for lifetime transfers, insurance distributions, and testamentary transfers. The "pour-over trust" may be revoked or amended at any time during the settlor's life and provides integrated professional management of all of the major assets in an estate.

Most jurisdictions have enacted the Uniform Testamentary Additions to Trust Act, which enables a testator to pour estate assets into a revocable trust.[103] Under the Act, bequests to a funded or unfunded trust are valid if the trust is identified in the testator's will and the terms of the trust are set forth in a written agreement executed before or concurrently with the will. A bequest is valid even if the trust has been revised after execution of the will. The bequest will be disposed of in accordance with the provisions of the trust agreement and not under the terms of the will.

The final choice available to an insured is to pay the proceeds to the trustee of a testamentary trust. This allows insurance assets to be subject to trust management and is the most inexpensive way to fully integrate insurance proceeds with estate assets. The major drawback to this alternative is that it delays distribution of proceeds until the trustee is appointed and authorized to act.

The job of a good estate planner is to ensure that no matter which alternative is selected, all controlling documents are consistent in reciting the client's intention. One mistake to avoid is to make a bequest of insurance assets in a will without changing the insurance beneficiary designation form. Although the insurance form designation will control in the event of an inconsistency, beneficiaries under the invalid will bequest could assert a claim against the estate or perhaps file an action against the will drafter for causing the ambiguity.

If insurance assets are to be paid to the estate or to a testamentary trustee, the lawyer should help the client complete insurance beneficiary designation forms. For the majority of military clients the usual scheme will be to pay the proceeds directly to a spouse with a contingent bequest to children in trust. The following beneficiary designation may be used to accomplish this result:

> All death proceeds shall be payable to the spouse of the insured if the spouse of the insured survives the

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[100]Before selecting a settlement option, the insured should carefully evaluate the rate of return on the proceeds left on deposit with the insurer.

[101]I.R.C. § 2042 (West Supp. 1989).

[102]44 Am. Jur. 2d *Insurance* § 1707 (1982).

[103]8A Unif. Laws Annot. 603 (1983). The states that have not enacted the Testamentary Additions to Trust Act are Louisiana, Missouri, Rhode Island, Virginia, and Wisconsin. 8A Unif. Laws Annot. 231 (1990 Supp.). With the exception of Missouri, however, these states have adopted other pour-over statutes.

insured by sixty (60) days or more; otherwise to the children of the insured, *per stirpes*, who survive the insured by sixty (60) days or more. Notwithstanding the foregoing, if any beneficiary identified above is less than the age of twenty five (25) years, then that beneficiary's share shall be paid to the trustee of the trust established for that beneficiary in the insured's will. If no will of the insured appointing a trustee shall be admitted to probate within six (6) months of the insured's death, the Insurer may pay the proceeds otherwise payable to the Administrator of the insured's estate.[104]

Many clients mistakenly believe that a will controls all of their assets, including insurance proceeds. Lawyers should take time to educate clients on how nonprobate assets such as insurance will be distributed and advise them on the methods available to avoid haphazard estate plans. MAJ Ingold.

Consumer Law Note

Warranties: State Lemon Laws

Recently, state lemon laws have been the subject of intense litigation in some jurisdictions. Because so many of our clients buy new cars, a rudimentary knowledge of lemon laws and familiarity with the results of litigation in this area of the law is essential for legal assistance attorneys.

While the term "lemon law" could be used to describe the federal Magnuson-Moss Warranty Act (MMWA),[105] it is more commonly used to refer to state laws. These new laws generally provide more powerful and expeditious remedies to consumers and should be consulted whenever available in a jurisdiction. Currently, state lemon laws are not as standardized as Uniform Commercial Code (UCC) provisions such as revocation of acceptance.[106] There are, however, a number of fairly standard lemon law characteristics. For example, lemon laws usually pertain only to new car sales.[107] Additionally, in most states any defects in a car must be substantial in order to successfully invoke the lemon law. Remedies typically include replacement of the vehicle or refund of the purchase price if a dealer is unable to repair a car in a reasonable number of attempts, usually four. If the owner is unable to use a car during a certain amount of time, usually thirty days during the first year of ownership, these remedies will also be available.

Lemon Law Arbitration

One facet of the typical lemon law has generated much of the current litigation—the arbitration mechanism found in most lemon law statutes. Arbitration provisions usually force automobile dealers and manufacturers to respond to consumer complaints much more rapidly than in the past. Before states began passing lemon laws with arbitration requirements, a consumer's only recourse was a lengthy and expensive lawsuit under the provisions of the state UCC or the federal MMWA. Dealers and manufacturers knew that consumers often did not have the monetary resources, time, and expertise necessary to successfully prosecute such a claim to its conclusion.

In many states, lemon laws have drastically reduced this problem. In New York, for instance, the law enables consumers to force manufacturers to submit to arbitration. The results have been significant. In 1989, 1,476 cases were decided by arbitration. Consumers prevailed in 827 of these cases. Of these, 762 consumers received cash refunds averaging $16,363 each and 65 received replacement cars. Through either arbitration or litigation in New York, 1,225 consumers in 1989 received refunds, replacement vehicles, or settlements totalling 17.8 million dollars.[108]

Successes such as those experienced by consumers in New York have lead to legal challenges. In *Motor Vehicle Manufacturers Association of the United States v. New York*[109] several automobile manufacturers, importers, and distributors challenged the mandatory arbitration mechanism in New York's new car lemon law.[110] They argued that the arbitration requirement denied them their right to a jury trial, restricted the New York Supreme Court's jurisdiction, and constituted an unconstitutional delegation of judicial authority to the arbitrators.

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[104] *See* 16 West's Legal Forms § 11.31 (1985) for a more detailed version of this and other similar forms.

[105] 15 U.S.C. § 2301-2312 (1982).

[106] The Uniform Commercial Code § 2-608.

[107] *But see* N.Y. Gen. Bus. Law § 198-b(b) (1990) (used cars with less than 36,000 miles are covered by the New York used car lemon law if they are sold by persons selling three or more used cars per year and they develop serious problems in the first 60 days or 3,000 miles, whichever comes first. Cars with more than 36,000 miles are covered for 30 days or 1,000 miles).

[108] *Report Bulletin 18*, Consumer and Commercial Credit 1 (Feb. 16, 1990) (discussing progress report released on Jan. 8, 1990, by the Attorney General of New York, Robert Abrams).

[109] 75 N.Y.2d 175 (1990).

[110] N.Y. Gen. Bus. Law § 198-a(k) (1989).

The court rejected these arguments. It determined that replacement claims are analogous to specific performance demands and refund claims are similar to demands for restitution. Therefore, according to the court, these actions were equitable in nature, and there was no right to a jury trial. As to the alleged restriction of the New York court's jurisdiction, the Court of Appeals noted that consumers could still file suit and either party could seek judicial review of the arbitration proceeding. The court also held that the manufacturers did not have a constitutional right to have the dispute resolved by a court or a public officer. The consumers were seeking equitable relief, so a jury trial was not required, and arbitration was a permissible substitute.

Statistics regarding consumer relief under the Connecticut lemon law help explain why manufacturers also are challenging the Connecticut statute. From 1985 through 1987, 94.63% of consumers received replacement, repair, incidental expenses, finance charges or other remedies as a result of Connecticut lemon law arbitration decisions.[111] Manufacturers have had more success in challenging the arbitration provisions in Connecticut's lemon law, however.

In *Motor Vehicle Manufacturers Association of the United States v. O'Neill*[112] the manufacturers used much the same grounds to attack the Connecticut lemon law[113] as they had used in New York. The manufacturers had no success with their claims that the law deprived them of their right to a jury trial and denied them due process and equal protection by requiring them to pay a $250 filing fee to defend against consumer claims. They were successful, however, with their argument that the lemon law improperly limited the scope of judicial review and the right of access to the courts. Under the Connecticut lemon law, consumers could force manufacturers to arbitration, but manufacturers could not force such a proceeding. If dissatisfied with the results, consumers could seek de novo review in court. Manufacturers were limited to appeals taken in accordance with statutory provisions for appealing arbitration decisions. The Connecticut Supreme Court agreed with the manufacturers that the disparate treatment violated the manufacturers' right to an opportunity to have a remedy in the courts, and it struck down this provision of the lemon law.

Lemon Laws and Federal Preemption

The manufacturers have also asserted that the Federal MMWA preempts state arbitration procedures. Under the MMWA, if a manufacturer has an arbitration procedure that complies with Federal Trade Commission (FTC) regulations, the manufacturer may require a consumer to exhaust remedies under the arbitration procedure before suing the manufacturer.[114] Many state arbitration mechanisms differ substantively and procedurally from the FTC guidelines. For example, the FTC informal dispute mechanism allows oral presentation by parties only if both the warranter and the consumer expressly agree to such presentations.[115] Minnesota's lemon law, on the other hand, allows either party to appear and make an oral presentation.[116] In New York, a consumer may elect to make arbitration binding.[117] Decisions under the FTC guidelines, however, are not binding on either party.[118]

Manufacturers have targeted these differences and argued that Congress conclusively intended to preempt state arbitration schemes. Alternatively, the manufacturers have asserted that the differences between the FTC guidelines and the state lemon law arbitration requirements make compliance impossible. The majority of the courts confronting these issues have held that Congress did not intend to preempt the states in this particular area and that compliance with both the FTC scheme and state mechanisms is not impossible.[119]

Conclusion

The message for consumers from this litigation is that state lemon laws are a very useful means of recourse when problems develop with new cars. Arbitration has been a key component in forcing car dealers and manufacturers to remedy these problems or replace the vehicles. The concerted and persistent efforts of automobile manufacturers to weaken or invalidate arbitration mechanisms highlight the usefulness and effectiveness of the lemon laws. Attorneys representing consumers should continue to explore available remedies under the UCC and MMWA. If the automobile in question is a recent model car, however, attorneys should also consult state lemon laws for an effective source of relief. MAJ Pottorff.

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[111] 212 Conn. 83, 561 A.2d 917 (1989).

[112] *Id.*

[113] Conn. Gen. Stat. § 42-184 (1989).

[114] 15 U.S.C. § 2310(a)(3) (1982).

[115] 16 C.F.R. § 703.5(f) (1990).

[116] Minn. Stat. § 325F.665, sub. 6(e) (1987).

[117] N.Y. Gen. Bus. Laws § 198-a(h) (1989).

[118] 16 C.F.R. § 703.3(j) (1990).

[119] *See, e.g.*, Motor Vehicle Manufacturers Association v. Abrams, 899 F.2d 1315 (2d Cir. 1990); Automobile Importers of America, Inc. v. Minnesota, 871 F.2d 717 (8th Cir.), *cert. denied*, 110 S. Ct. 201 (1989); Chrysler Corp. v. Armstrong, 755 F.2d 1192 (5th Cir. 1985). *Contra* Wolf v. Ford Motor Co., 829 F.2d 1277 (4th Cir. 1987) (state common law fraud claim, alleging Ford misrepresented its private dispute mechanism as independent, was preempted by the Magnuson-Moss Warranty Act).

Claims Report

United States Army Claims Service

Investigation and Settlement of Tubal Ligation Claims

Major Phil Lynch and Major Stephanie Brown

Introduction

Claims judge advocates are often called upon to investigate claims for alleged negligent bilateral tubal ligations (BTLs) that resulted in the births of unwanted children. This article will discuss the procedures that should be followed in the investigation and settlement of BTL claims under the Federal Tort Claims Act (FTCA) or the Military Claims Act (MCA). Often, BTL claims may be settled by claims judge advocates for under $25,000.

BTL claims are one type of wrongful pregnancy or wrongful conception claims that are brought by the parents of healthy, but unwanted children. BTLs are the most common sterilization procedures for women and generate the highest number of wrongful pregnancy claims. Vasectomies, failed abortions, and negligent filling of birth control pill prescriptions are other types of wrongful pregnancy claims.[1] Wrongful pregnancy claims for the birth of healthy children are a relatively new development in the United States.

Wrongful pregnancy claims must be distinguished from two similar causes of action, *wrongful birth* and *wrongful life*. Parents file *wrongful birth* claims when they allege that they would not have conceived a child or that they would have terminated a pregnancy if they had received proper genetic counseling. The parents in wrongful birth claims usually seek pecuniary damages for the expenses of caring for a child with birth defects and for their own nonpecuniary damages.[2] BTL claims normally involve a child with no genetic injuries.

A child or a child's representative may file a claim for *wrongful life*, alleging that the genetically impaired child would not have been born if the parents had received appropriate genetic counseling. Courts have awarded costs of lifelong medical care, but generally do not allow nonpecuniary damages.[3] *Wrongful birth* and *wrongful life* claims are beyond the scope of this article.

The Wrongful Pregnancy Cause of Action and Damages

As with all FTCA medical malpractice claims, the claims judge advocate charged with investigating a BTL claim must determine if the action is cognizable in the jurisdiction where the alleged negligence occurred. Outside the United States, liability in wrongful pregnancy claims is determined by reference to general principles of tort law common to the majority of United States jurisdictions. Damages are determined in accordance with established principles of general maritime law as interpreted by federal court decisions.[4]

Historically, courts in the United States have not allowed parents to recover for the birth of normal, healthy children. In 1967 a California appellate court ruled that there were compensable damages for a negligently performed sterilization that resulted in the birth of a normal, but unwanted child.[5] In 1970 a Florida appellate court reversed a trial court's dismissal of an alleged negligent sterilization.[6]

Courts in thirty states have since awarded damages for wrongful pregnancy, although they have not awarded pecuniary damages for the costs of raising a healthy child.[7] The courts following the majority rule have not awarded damages in a consistent manner. Damages may include:

1. The costs of the failed sterilization procedure and the obstetrical care.

2. The patient's pain and suffering and emotional distress during the original sterilization, the pregnancy and birth, and a subsequent sterilization, if any.

3. Loss of consortium after the original sterilization, during the pregnancy, and after any subsequent sterilization.

4. Personal injury to the mother during delivery.

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[1] Kendrick, *Complications of Vasectomies in the United States*, 25 J. Fam. Pract. 245 (1987).

[2] Robak v. United States, 658 F.2d 471 (7th Cir. 1981); Phillips v. United States, 575 F. Supp. 1309 (D. S.C. 1983). *See also* Rouse, *Atkinson and the Application of the Feres Doctrine in Wrongful Birth, Wrongful Life, and Wrongful Pregnancy Cases*, The Army Lawyer, May 1987, at 58.

[3] Harbeson v. Parke Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983), *aff'd*, 746 F.2d 517 (9th Cir. 1984); Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954 (1982).

[4] Army Reg. 27-20, Claims, paras. 3-8b and 3-11 (28 Feb. 1990) [hereinafter AR 27-20].

[5] Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

[6] Jackson v. Anderson, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970).

[7] *See* Appendix.

5. Loss of wages due to pregnancy and childbirth.[8]

The majority rule precluding recovery of child rearing expenses is based on several theories. First, many courts have held there is no compensable injury once a healthy child has been born.[9] Second, judges have expressed concern about placing a value on the benefits of being a parent and comparing it to the cost of raising a child.[10] Finally, courts have been troubled by the possibility a child would discover that an action has been filed by the parents indicating the child was unwanted.[11]

Courts in six states have allowed recovery of child rearing expenses. These courts usually offset the cost of raising the child with the benefits of being a parent. This offset is usually described as the *benefits rule*. Courts in Arizona,[12] California,[13] Connecticut,[14] Maryland,[15] Michigan,[16] and Minnesota[17] follow the benefits rule. The application of the benefits rule in the District of Columbia is unclear.[18]

Under the Military Claims Act, claims judge advocates must use general principles of United States tort law to determine if a personal injury claim is compensable.[19] If the claim is determined to be compensable, damages are to be determined under general maritime law. Where general maritime law provides no interpretation of allowable damages, damages will be determined in accordance with general principles of United States tort law.[20] Therefore, claims judge advocates considering BTL claims that arise outside the United States should use the majority rule in assessing the value of the claim. In most cases, this will limit damages in BTL claims to less than $25,000 because the nonpecuniary damages are for limited periods and the follow-up medical care is usually provided in military hospitals. Compensable nonpecuniary damages may include the patient's pain, suffering, and emotional distress during the failed sterilization, the pregnancy, the birth, and the subsequent sterilization, in addition to loss of consortium claims by the patient and spouse.

Investigation of a Wrongful Pregnancy Claim

After determining a BTL claim is cognizable, a claims judge advocate should begin the claims investigation. The first step in the investigation of a tubal ligation claim is to obtain the applicable medical records. The operative report, informed consent form, and the physician's counseling note should be reviewed. Because BTLs are often scheduled many weeks in advance, there are usually entries concerning counseling in the patient's outpatient record.

The patient should have signed the informed consent form. The operating surgeon should specify the procedure to be performed, alternative forms of birth control, and the attendant risks. Generally, the physician should

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[8] Macomber v. Dillman, 505 A.2d 810 (Me. 1986); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1986).

[9] Johnston v. Elkins, 241 Kan. 407, 736 P.2d 935 (1987); O'Toole v. Greenberg, 488 N.Y.S.2d 143, 477 N.E.2d 445 (1985).

[10] Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984); Beardsley v. Wierdsma, 650 P.2d 288 (Wy. 1982).

[11] McKernan v. Aasheim, 102 Wash. 2d 411, 687 P.2d 850 (1984).

[12] University of Arizona Health Sciences Center v. Superior Court of State in and for Maricopa County, 136 Ariz. 579, 667 P.2d 1294 (1983) (In addition to all other pecuniary and nonpecuniary damages, the court ruled costs of raising and educating a healthy child were recoverable, but must be offset by pecuniary and nonpecuniary benefits that parents will receive from having child.)

[13] Morris v. Frudenfield, 135 Cal. App. 3d 23, 185, Cal. Rptr. 76 (1982) (Damages for a failed abortion resulting in birth of a healthy child include all damages normally recoverable in a tort action, including child rearing expenses, offset by the value of the benefits of enjoying the child's love and affection.)

[14] Ochs v. Borelli, 187 Conn. 253, 445 A.2d 883 (1982) (The court affirmed the trial court's award of child rearing expenses and the application of the benefits rule. The court also affirmed damages for medical expenses and pain and suffering.)

[15] Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984) (In action for damages based on negligent sterilization resulting in birth of healthy child, trier of fact is permitted to consider awarding damages to parents for child-rearing costs through the age of the child's majority, offset by benefits derived by the parents from the child's aid, society, and comfort.)

[16] Green v. Sudakin, 81 Mich App. 545, 265 N.W.2d 411 (1978) (The court allowed recovery of costs of raising a healthy child and rejected the argument that such a recovery should be precluded on public policy grounds.)

[17] Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (The court held that in action for birth of normal, healthy, child proximately caused by negligently performed sterilization operation, damages could be recovered for prenatal and postnatal medical expenses, mother's pain and suffering during pregnancy and delivery, loss of consortium, and additionally, reasonable cost of rearing the unplanned child, subject to offsetting this item of damages by the value of the child's aid, comfort, and society during the parents' life expectancy.)

[18] Hartke v. McKelway, 707 F.2d 1544 (D.D.C), *cert.denied*. 464 U.S. 983 (1983); *but see* Flowers v. District of Columbia, 478 A.2d 1073 (D.C. 1984) (In *Hartke*, the court recognized the benefits rule but held that the trier of fact should inquire into the parent's reasons for seeking sterilization. If the parents situation has significantly changed by the presence of a child, the benefits rule may not always be applicable. 707 F.2d at 1555. In *Flowers*, the D.C. Court of Appeals applied the benefits rule in the traditional manner, holding that the benefits of raising a child outweigh the burdens as a matter of law. 478 A.2d at 1074.)

[19] AR 27-20, para. 3-8b.

[20] AR 27-20, para. 3-11a.

discuss birth control pills, diaphragms, cervical caps, and vasectomies.[21] Informed consent forms for tubal ligations often list alternative methods of tubal ligation that may be used, depending upon what the physician finds once the operation has begun.[22] As long as one of the described methods of tubal ligation is used, the permit is valid. The counseling note should list the methods discussed with the patient and should indicate that the patient was told of the risk of failure.

If the patient considering a BTL is married, physicians should seek to discuss the procedure with the patient's spouse. Claims judge advocates should advise physicians to suggest a joint informed consent session with their patients. While the patient has the right to consent to a BTL without her spouse's consent, the physician should try to discuss the risks and benefits of surgery with the patient *and spouse*. If the patient declines to have her spouse participate in the informed consent discussion, physicians should note this in the medical records.

The objective of every BTL is to achieve complete occlusion of both fallopian tubes so pregnancy cannot result. This can be attempted through a variety of methods: fulguration (burning); fulguration and cutting; banding/ringing; tying and cutting; or clipping.[23] Even without negligence, all methods of tubal ligation or occlusion have failure rates that range from one in a hundred to one in a thousand, depending on the method used.[24] No matter which method is used, scar tissue has a tendency to recanalize (form a new passage), and therefore permit the passage of the egg and sperm.[25] The fact of a subsequent pregnancy is not, in and of itself, proof of negligence, nor is it the basis for payment.

The operative report should describe the procedure performed in detail. The description should include notations that the fimbriated end of each tube was identified, the location and method of occlusion, and whether there were any unusual findings or complications. The fallopian tube has four distinct sections: 1) the fimbria (open end away from the uterus); 2) the ampulla; 3) the isthmus; and 4) the cornual insertion (the end entering the uterus).[26]

There are a number of elements of the procedure itself that must be investigated in order to determine whether the failure was due to negligence. Unless the operative report states that the fimbria of each tube was identified, there is the possibility that a structure other than the fallopian tube was occluded. For those techniques in which parts of each fallopian tube are cut and removed, there should be a pathology report in the medical record that identifies the lumen (cavity of the tube) and tissues from both the right and left fallopian tubes.

Other methods of tubal occlusion employ the use of silastic rings or bands, clips, or fulguration.[27] These methods should be performed on the isthmic portion of the tube and the record should so reflect. The investiga-

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[21] *See* Army Reg. 40-3, Medical, Dental and Veterinary Care, para. 2-19 (15 Feb. 1985) (discussion of informed consent procedures in Army hospitals).

[22] R. Mattingly, Te Linde's Operative Gynecology 346 (5th ed. 1977).

[23] N. Kase and A. Weingold, Principles and Practice of Surgical Gynecology 1067 (1983).

The following is a summary of surgical techniques claims judge advocates may encounter during investigations of BTL claims:

1) Pomeroy: The mid-portion of the tube is pulled up to form a knuckle and suture is placed around the base of the knuckle. The knuckle of tube is then cut off. An additional suture may then be placed around one to the two remaining stumps to further prevent recanalization.

2) Fallope Ring: The mid-portion of the tube is pulled up to form a knuckle and tight silastic band is placed over the knuckle. By tightly banding the tube around the base of the knuckle, the blood supply to the knuckle is cut off and the tube is blocked. Once the knuckle dies from lack of blood supply, it falls off leaving two separate ends of tube unconnected.

3) Hulka/Bleier/Weck Clips: The mid-portion of the tube is clipped in one or two places. The clip mechanically blocks the tube and promotes scaring in that area. If two clips are used, this may also result in a loss of blood supply to the section of tube between the clip, thus further "blocking" the tube.

4) Fulguration: Using a coagulation unit, one or more areas of the mid-portion of the tube are burned. This causes scarring which blocks the tube. This method carries the added risk of bowel burns depending on the type of unit used.

5) Fulguration and Cutting: The tube is fulgurated as above and a section of tube between two burned areas is removed.

6) Uchida: The tube is cut in half and one end is burned in the broad ligament. The other end is ligated and left outside the broad ligament.

Id. at 1068.

[24] *Id.* at 1070.

[25] R. Mattingly, *supra* note 22, at 346.

[26] J. Pritchard, P. MacDonald, and N. Gant, Williams Obstetrics 23 (17th ed. 1985).

[27] *Id.* at 827.

tion in these cases will center on whether the correct structures, i.e., the fallopian tubes, were involved. If there is evidence that the round ligament or the mesosalpinx was involved instead of the fallopian tube, there was negligence.

Generally, only a second operation will provide this type of evidence. Usually, the operating physician will comment on the status of the fallopian tubes if he or she is aware that the patient had been sterilized prior to a pregnancy. The physician will be able to see the involved structures only during an invasive procedure, such as a cesarean section,[28] a laparotomy,[29] a mini-laparotomy,[30] or a laparoscopy,[31] but not as part of a vaginal delivery.

If only one tube is mentioned in a medical record, the claims judge advocate should review the entire medical record, both inpatient and outpatient. There are cases in which a woman has had a prior surgery that resulted in the removal of one of the fallopian tubes, and the sterilization record will therefore refer to the one remaining fallopian tube.

Tubal failures due to negligent occlusion tend to result in pregnancy within a year to eighteen months after the procedure, provided that the woman has continued to be sexually active.[32] When more than one or two years have elapsed between the sterilization and the subsequent pregnancy, many doctors assume that the tube or tubes have created a fistula (tract) or recanalized.[33] As mentioned above, scar tissue can form a new canal. Nevertheless, this takes time, and the woman will remain infertile until the canal has formed sufficiently to allow the passage of sperm and egg. This may cause some women to become pregnant many years after being sterilized.

A hysterosalpingogram (HSG) is a relatively quick and low risk procedure that involves injecting dye into the fallopian tubes through a catheter inserted through the cervix and taking radiographs of the resulting flow of dye.[34] A narrow opening in the tube may indicate that, although originally occluded, the tube created a fistula or recanalized/reanastomosed (two portions of tube rejoined). Claims judge advocates should note that the HSG may show the patency of the tubes. It will not indicate whether the wrong structure, such as the round ligament, was ligated by mistake.

After reviewing the medical records, the claims judge advocate should interview the physician who performed the BTL. The claims judge advocate should review the physician's credentials file before the interview to determine the physician's educational background and to discover if the physician has been decredentialled at any time. When interviewing the treating physician, the claims judge advocate should have the physician explain all notes in the patient's chart. If the physician does not remember the patient, the physician should describe the normal BTL informed consent discussion. During the interview, the claims judge advocate should ask the physician how many BTLs the physician has performed, and the physician should describe any complications experienced by any BTL patients the physician has treated.

The claims judge advocate should interview the surgeon who performed the second operation. The second surgeon may not always comment on the fallopian tubes in the operative report, but may remember that there was no tubal occlusion. Surgeons tend to remember cases where it appears the patient's round ligament or mesosalpinx was mistakenly occluded.

Pregnancy following a tubal ligation may or may not be the result of negligence. Only a careful review of the available records and a medical examination of the woman will provide the information required to decide this. It is the claimant's burden to establish that the procedure failed due to negligence. This will usually require that the claimant provide an expert opinion describing the negligent acts that caused the pregnancy.

Claimant Interviews

After establishing that the sterilization procedure was performed negligently, the claims judge advocate should informally interview the claimants. Claims judge advocates are encouraged to use an interview checklist to ensure they obtain all information necessary to obtain approval of the settlement.[35]

In a BTL claim, the claims judge advocate should ask questions about the marital status of the parents, the age of both parents, family income, the mother's pain and suffering during the pregnancy, the medical course of treatment of the parent who may have undergone a subse-

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[28] *Id.* at 871. A cesarean section is an incision in the lower uterine segment transversely or vertically.

[29] N. Kase and A. Weingold, *supra* note 23, at 1067. Laparotomy: Opening the abdominal or pelvic cavity through a large incision in the abdomen.

[30] *Id.* Minilaparotomy: Entering the abdominal or pelvic cavity through a small incision.

[31] *Id.* Laparoscopy: Entering the abdominal or pelvic cavity with a lighted scope through a small opening referred to as a stab wound. One or more wounds may be required depending on the technique and procedure to be performed.

[32] R. Mattingly, *supra* note 22, at 346.

[33] *Id.*

[34] K. Niswander, Manual of Obstetrics 221 (3d ed. 1987).

[35] Dep't of Army, Pam. 27-162, Claims, app. I (15 Dec. 1989) [hereinafter DA Pam. 27-162].

quent sterilization procedure, and any out-of-pocket expenses incurred by the claimants. In addition, the parent's views on abortion should be discussed in the context of mitigation of damages.[36] Claims judge advocates should be aware, however, that no court has ever ruled that parents must mitigate damages by seeking an abortion.

In those states that allow for the costs of raising a healthy child, claims judge advocates must address the benefits rule and discuss with the parents the costs of raising the child. This is necessary in order to balance the child rearing expenses with the less tangible benefits of the parent-child relationship.

Conclusion

Claims judge advocates charged with investigating and settling BTL claims should determine if the claim is cognizable, conduct a complete investigation of the medical care, and interview the claimants. The U.S. Army Claims Service may be willing to delegate settlement authority on these claims once the claims judge advocate has done a complete legal analysis and factual investigation.[37]

Appendix

Courts Awarding Damages for Wrongful Pregnancy

Alabama—Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982) (Damages recoverable include hospital expenses, physical pain and suffering, mental anguish, husband's loss of consortium during pregnancy and immediately after birth, and medical expenses incurred as a result of the pregnancy.); *Arkansas*—Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (Ark. 1982) (Damages for a negligent vasectomy include any and all damages connected with the pregnancy and operation. Public policy bars an award for child rearing expenses for a healthy child.); *Colorado*—Camacho v. Martin, No. 79 CV3378 (Denver Dist. Ct., filed 30 Nov. 1982) ($54,000 jury verdict for pecuniary damages in BTL claim); *Delaware*—Coleman v. Garrison, 349 A.2d 8 (Del. 1975) (damages limited to pain and suffering, medical expenses, and loss of consortium); *Florida*—Fassoulas v. Ramey, 450 So. 2d 822 (Fla. 1984) (The court held that ordinary child rearing expenses for both a normal and defective child are not recoverable, but special upbringing costs associated with raising a defective child to the age of majority are recoverable.); *Georgia*—Fulton-Dekalb Hospital Authority v. Graves, 252 Ga. 441, 314 S.E.2d 653 (1984) (The court held that damages for unsuccessful medical procedure that led to conception or pregnancy included pain and suffering, medical complications, costs of delivery, lost wages and loss of consortium.); *see also* White v. United States, 501 F. Supp 146 (D. Kan. 1981) (The court, interpreting Georgia law, held that damages for unsuccessful medical procedure that led to conception or pregnancy included pain and suffering, medical complications, costs of delivery, lost wages, and loss of consortium.); *Illinois*—Clay v. Brodsky, 148 Ill. App. 3d 63, 701, 499 N.E.2d 68 (1986) (The parents in wrongful pregnancy action were not limited to damages caused by actual delivery, but were entitled to all damages caused by pregnancy including pain and suffering, disability and disfigurement, value of lost earnings, medical expenses, and housekeeper's expenses incurred as result of pregnancy.); *Indiana*—Garrison v. Foy, 486 N.E.2d 5 (Ind. App. 1985) (Damages recoverable in wrongful pregnancy action are damages owed the parent, not the unplanned child, due to unsuccessful medical procedures for sterilization and resulting birth of child. Costs of rearing child born after unsuccessful sterilization procedure cannot be recovered from health care provider in wrongful pregnancy action.); *Iowa*—Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984) (The court did not allow damages for raising healthy child and remanded for consideration of other requested damages.); *Kansas*—Johnston v. Elkins, 241 Kan. 407, 736 P.2d 935 (1987) (Patient and his wife could not recover damages relating to future child rearing expenses but could recover damages for expenses of operation, physical pain and suffering of patient and wife, cost of prenatal care, delivery, and tubal ligation, and loss of consortium at time of vasectomy, during later stages of pregnancy, and during reasonable recovery period.); *Kentucky*—Schork v. Huber, 648 S.W.2d 861 (Ky. 1983) (The court allowed all damages normally recoverable in a personal injury action, but did not allow costs for raising healthy child.); *Louisiana*—Pitre v. Opelousas General Hospital, 530 So. 2d 1151 (La. 1988) (The court allowed damages for emotional and mental distress associated with the birth of an unplanned and unwanted child, medical expenses, and the father's loss of consortium.); *Maine*—Macomber v. Dillman, 505 A.2d 810 (Me. 1986) (Damages for negligent failure to comply with standard of care of medical practice in performance of a tubal ligation were limited, where applicable, to hospital and medical expenses incurred for sterilization procedures and unwanted pregnancy, pain and suffering connected with pregnancy, and loss of earnings by mother during that time, as well as damages in favor of husband for loss of consortium. Damages for cost of rearing and educating a healthy, normal child were not recoverable.); *Missouri*—Sanders v. H. Nouri, M.D., Inc., 688 S.W.2d 24 (Mo. Ct. App. 1985) (Wrongful conception gives rise to compensatory damages that are measurable; such damages might include prenatal and postnatal medical expenses, mother's pain and suffering during pregnancy and delivery, loss of consortium, and the cost of a second,

[36] *Hartke*, 707 F.2d at 1552.

[37] *See* DA Pam. 27-162, para. 5-35(b).

corrective sterilization.); *New Hampshire*—Kingsbury v. Smith, 122 N.H. 237, 442 A.2d 1003 (1982) (In wrongful conception action, recovery of damages is limited, where applicable, to hospital and medical expenses of pregnancy, cost of sterilization, pain and suffering connected with pregnancy, and loss of mother's wages during that time. Husband may bring cause of action for his loss of consortium arising from wife's conception of healthy child as a result of faulty sterilization procedure.); *New Jersey*—P. and Husband v. Sportadin, 179 N.J. Super. 465, 432 A.2d 556 (N.J. Super. Ct. App. Div. 1981) (The court held parents could not recover for future expenses that they might incur in raising, educating, and supervising child, but mother could recover damages for pain and suffering accompanying her delivery.); *New York*—O'Toole v. Greenberg, 488 N.Y.S.2d 143, 477 N.E.2d 445 (1985) (The Court of Appeals held that, as matter of public policy, the husband and wife suffered no legally cognizable harm merely by virtue of birth of healthy child, conceived after unsuccessful surgical birth control procedure, and there could accordingly be no recovery from allegedly negligent doctors, hospital, and clinic for pecuniary expenses of raising the healthy and normal, but unplanned, child.); *North Carolina*—Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986) (Patient who suffered unwanted pregnancy as result of physician's negligence could recover damages for hospital and medical expenses of pregnancy, pain and suffering connected with that pregnancy, lost wages, and loss of consortium, but could not recover for costs of rearing the child.); *Ohio*—Johnson v. University Hospitals of Cleveland, 44 Ohio St. 3d 49, 540 N.E.2d 1370 (1989) (The court allowed recovery for delivery fees, prenatal care, loss of spousal consortium and services during pregnancy, pain and suffering during pregnancy and child birth.); *Oklahoma*—Wofford v. Davis, 764 P.2d 161 (Okla. 1988) (The court held that parents could not recover damages for cost of rearing child but could recover the medical and surgical expenses of the negligent sterilization.); *see also* Morris v. Sanchez, 746 P.2d 184 (Okla. 1987) (The court held the plaintiffs could recover all reasonable damages except child rearing expenses and there was no duty to mitigate damages by aborting the fetus.); *Oregon*—Pearson v. Schafer, Civil Action No. A8106-03717 (Multnomah County Cir. Ct. December 9, 1982) (The jury awarded $78,178 for wife's impairing capacity and wife's physical and mental pain and suffering.); *Pennsylvania*—Mason v. Western Pennsylvania Hospital, 499 Pa. 484, 453 A.2d 974 (1982) (The court allowed all costs associated with pregnancy and delivery. Costs of raising healthy child were held not compensable.); *Tennessee*—Smith v. Gore, 728 S.W.2d 738 (Tenn. 1987) (Damages for medical expenses, pain and suffering, and loss of wages during pregnancy, delivery, and short period of postnatal period are recoverable.); *Texas*—Hickman v. Myers, 632 S.W.2d 869 (Tex. Civ. App. 1982) (Damages for raising a healthy child are not recoverable in Texas.); *Utah*—C. S. v. Nielson, 767 P.2d 504 (Utah 1988) (Damages are recoverable for: any medical and hospitalization expenses incurred as result of physician's negligence, including cost of initial unsuccessful sterilization operation, prenatal care, child birth, postnatal care, and any increased cost for second sterilization operation if obtained; compensation for physical and mental pain and damages suffered by mother as result of pregnancy and subsequent child birth and as result of undergoing sterilization operation and during reasonable recovery period; wages necessarily lost by mother and/or father of child; and punitive damages, if applicable.); *Vermont*—Begin v. Richmond, 150 Vt. 517, 555 A.2d 363 (1988) (The Vermont Supreme Court recognized wrongful pregnancy action and remanded for trial.); *Virginia*—Miller v. Johnson, 231 Va. 177, 343 S.E.2d 301 (1986) (The proper damages in a wrongful pregnancy action where the child is born reasonably sound and healthy include medical expenses, pain and suffering, and lost wages for a reasonable period, directly resulting from negligently performed abortion, continuing pregnancy, and ensuing childbirth. The mother is also entitled under the general rule to recover damages, if proven, for emotional distress causally resulting from tortuously caused physical injury.) *See also* McNeal v. United States, 689 F.2d 1200 (4th Cir. 1982) (The court ruled Virginia law did not allow recovery of child rearing costs.); *Washington*—McKernan v. Aasheim, 102 Wash. 2d 411, 687 P.2d 850 (1984) (The parents of a healthy, normal child born after an unsuccessful sterilization operation may not recover the child rearing costs against the physician, but may recover the expense, pain and suffering, and loss of consortium associated with the failed tubal ligation, pregnancy, and childbirth, because damages may be established with reasonable certainty and do not invite disparagement of the child involved.); *West Virginia*—James G. v. Caserta, 332 S.E.2d 872 (W.Va. 1985) (Damages, including costs of initial unsuccessful sterilization operation, prenatal care, childbirth, postnatal care, and a second sterilization operation if obtained, physical and mental pain suffered by mother as result of pregnancy and subsequent childbirth and as result of undergoing two sterilization operations, and loss of consortium and wages, are recoverable in a wrongful pregnancy action.); *Wyoming*—Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982) (The parents were entitled to submit to trier of fact expenses associated with unsuccessful ligation, including medical and hospital expenses for birth of unplanned child, wages necessarily lost by woman because of pregnancy and childbirth, or because of abortion, pain and suffering, and costs of abortion.).

But see Szekeres v. Robinson, 715 P.2d 1076 (Nev. 1986) (Nevada does not allow wrongful pregnancy claims); Rieck v. Medical Protective Company 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (The Wisconsin Supreme Court ruled wrongful pregnancy claims are not cognizable in Wisconsin.).

Verifying Maneuver Damage in Korea

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In August 1988, the United States General Accounting Office (GAO) issued a report entitled, "MANEUVER DAMAGE—DOD Needs to Strengthen U.S. Verification of Claims in Germany," to the U.S. Senate Subcommittee Chairman on Readiness, Sustainability and Support Committee on Armed Services.

The report stressed the importance of on-site verification by United States claims investigators of maneuver damage, especially in regard to high-cost road damage claims. Between May and July 1986, the U.S. Army Claims Service, Europe (USACSEUR), with assistance from the U.S. Army Corps of Engineers, tested the cost effectiveness of on-site inspections by reviewing 94 claims in Main-Kinzig county. USACSEUR projected a potential savings of up to $10 million a year if on-site inspections became a routine verification technique in Germany. The NATO SOFA, however, gives the Federal Republic of Germany the exclusive right to investigate and adjudicate claims. In addition, continued use of engineering assets would eventually require additional personnel for USACSEUR or additional funding for continued use of Army Corps of Engineers assets. The United States Armed Forces Claims Service, Korea (USAFCS-K), in response to the August 1988 GAO report, determined that a test program using engineering assets to inspect maneuver road damage in the Republic of Korea (ROK) would be an appropriate response to those GAO recommendations.

Maneuver road damage in Korea comes primarily from the annual springtime Team Spirit exercises, which involve joint US-ROK forces. The Claims Service had already dispatched mobile maneuver damage patrol teams during the past several exercises to determine whether or not alleged damage was caused by U.S., joint, or ROK forces. Although these patrol teams were already verifying maneuver damage by on-site inspections, they lacked the expertise to determine whether the amounts claimed for road damage were reasonable. Generally speaking, if our mobile teams verified that U.S. forces caused the damage claimed, USAFCS-K accepted the amount adjudicated by the various ROK District Compensation Committees or the ROK Ministry of Justice.

Upon receipt of the August 1988 GAO report, however, USAFCS-K had not yet reimbursed the ROK government for the U.S. share of Team Spirit 88 maneuver damage. A mobile team was again dispatched to the exercise area with an engineer on loan from the Army Corps of Engineers. The claimed amount for road damage was $777,212, while our engineer estimated the damage to actually be only $204,019. A similar result occurred for Team Spirit 89, where the amount claimed for road damage for that exercise was $597,603, while our estimate with engineering assistance was only $100,152. Although an engineer has not yet evaluated the road damage for Team Spirit 90, the amount claimed by the ROK government is only $286,218. It would appear that the use of engineering assets to evaluate the cost of every maneuver road damage claim may not be necessary after engineers are used for an initial three or four year period. Use of an engineer on a "spot-check" basis may be appropriate for later exercises. Such occasional use would preclude the necessity of additional resources or funding for full-time assistance and yet preserve the cost effectiveness of utilizing engineering expertise in evaluating maneuver road damage claims.

Claims Notes

Claims Policy Note

Requesting Government Bills of Lading from USAFAC

This is a Claims Policy Note that updates figure 3-3, DA Pamphlet 27-162, and provides additional guidance to that found in paragraph 3-6, DA Pamphlet 27-162. IAW paragraph 1-9f, AR 27-20, this guidance is binding on all Army claims personnel.

When claims offices cannot obtain government bills of lading (GBLs) from other sources, such as the destination transportation office, the origin transportation office, or the carrier, they may obtain them from the U.S. Army Finance and Accounting Center (USAFAC). Note, however, that USAFAC does not receive the GBL until the carrier submits a bill, and claims offices should not request GBLs—particularly recent GBLs—from USAFAC until they have tried other sources.

Figure 3-3, DA Pamphlet 27-162, shows a sample Request for Fiscal Information Concerning Transportation Requests, Bills of Lading, and Meal Tickets (DD Form 870) used to request a copy of a GBL and its related documents from USAFAC. The address that appears in the figure is incorrect, however, and should be changed to:

U.S. Army Finance and Accounting Center
Transportation Operations
Data Research & Reduction Division
ATTN: FINC-HGC
Indianapolis, IN 46249-0631

To verify shipment data and match GBLs received with claim files, list the name of the person the GBL pertains to and the Army claim number in Block 12 of DD Form 870. Also, list the year the GBL was issued in parentheses next to the GBL number in Block 4 of DD Form 870 as indicated in Figure 3-3; this identifies the correct tape for the finance clerk to retrieve and speeds up responses. Send a separate DD Form 870 for each GBL requested. Ms. Shollenberger.

Tort Claims Notes

Representing Both Driver and Passenger

Representation by one attorney of both the driver and the passenger of a vehicle that was involved in an accident can create a conflict of interest that is easily overlooked by the civilian counsel and the claims judge advocate. Usually this problem presents itself in a "fact pattern" comparable to that set forth below.

SSG Rodney, while operating a government vehicle slightly above the posted speed limit, collides into the passenger side of a civilian vehicle owned and operated by Rowena. SSG Rodney had the right of way. Elmer is a passenger in the Rowena vehicle. An SF 95 is presented on behalf of Elmer and Rowena by the same attorney.

Civilian counsel has created at least two issues in his representation of both the driver and passenger. First, can he or she ethically represent both Rowena and Elmer? Second, can the attorney withdraw from representing one and still represent the other?

DA Pam 27-26, Rules of Professional Conduct for Lawyers, Rule 1.7, states that: "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client." In that both SSG Rodney and Rowena may have been negligent, Elmer may have an action against both tortfeasors. Hence, under the Army Rules, the civilian attorney cannot ethically represent both Elmer and Rowena. Although the civilian counsel is not governed by the Army Rules, he will be bound by the conflict of interest rules adopted by his licensing jurisdiction.

Can civilian counsel withdraw from representing either Elmer or Rowena and still represent the other? Rule 1.9 of the Army Rules states, in part: "A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or substantially related matter in which the person's interests are materially adverse to the interests of the client...." Hence, the rule appears to permit the attorney to withdraw from representing Elmer while continuing his representation of Rowena. However, the rule does not appear to permit the attorney to withdraw from representing Rowena while continuing to represent Elmer. The distinction is that Elmer may have a claim adverse to Rowena, whereas Rowena probably has no claim adverse to Elmer.

Claims judge advocates presented with this problem should bring the matter to the attention of civilian counsel. Once presented, most attorneys will recognize the conflict and take corrective action. If civilian counsel fails to take corrective action, it may raise a substantial question of his fitness as a lawyer. Rule 8.3 of the Army Rules requires these violations to be reported through the supervisory chain in accordance with the guidelines outlined in Chapter 7 of AR 27-1. CPT Bryant.

Army Tort Claims Database

In December 1989, the tort claims division integrated the data produced by the field office "TT" database system, which has been used by claims offices since 1987, into the consolidated Army tort claims database. This addition of automation capability allowed the tort claims division to readily review the monthly field office submissions to the "TT" database, to monitor the field office's progress on claims, and to manage better our internal workload.

In our initial review of the field office's data, one of the most interesting things the tort claims division discovered is that some field offices did not recognize that use of the "TT" program is *mandatory*. Each field office must submit a monthly report to USARCS including an update of its automated data. Some offices have apparently felt that there was no need to "participate" in the "TT" automation system at all, because their caseload was so low. Others felt that only periodic updating, i.e., once a quarter or semiannually, was all that was necessary. Such is not the case. Field offices, including Corps of Engineers district offices, must enter new data in the tort claim computer record contemporaneously with the occurrence of the related event concerning a particular claim and must submit required data reports.

To ensure that field offices are doing their programming correctly, supervisors must check to see if the most current version of the "Users Manual for Revised Tort and Special Claims Management Program," dated February 1990, is being used. There have been some significant changes in the coding elements for types of injury and damages. Please ensure that your office has the "new" version of the booklet, that *all* personnel involved in tort automation read the book, and that they use the new codes.

As with any new system, and particularly automation systems, there have been some "quirks" in the system that need your attention:

First, when a field office forwards a "mirror file" to USARCS, please ensure that a field office claims number has been assigned to *each* SF 95 and that the number is noted on the SF 95. (*See* paragraph 5-19, DA Pamphlet 27-162, for these requirements. *See also* Mr. Robert Frezza's Management Note, *Sorting and Marking Claims Files Sent to USARCS*, The Army Lawyer, June 1990, at 69.) Additionally, *all* mirror files and subsequent transfers of claims to USARCS should *always* include the "printscreen" from the "TT" database system. Adherence to these standards will help eliminate the need for USARCS to call the field office to determine the claim number and other necessary claims information. Further, it will avoid the potential problem of USARCS giving the claim a duplicate number and then maintaining two records of the same claim on the database.

Second, field offices must be extremely conscientious in checking the data entries made on the system. During our reviews, we have found several instances where there is a transposition in field office code numbers or a variation in spelling of a claimant's name. The result is a dual entry of the claim under different claims numbers or under different spellings of the same name. Please ensure that operators of the system correct mistakes by correcting the improper information they have entered into the system and not be adding the information again under a new claim number generated by the system. Operators must pay particular attention to detail when correcting entries in the database environment.

Third, claims judge advocates or claims attorneys must *personally* check the entries in the database to ensure that the chapter, injury and damage coding information is correct. Much statistical data can be and is derived from these data elements, particularly in responding to the Surgeon General on medical malpractice cases. Errors in coding prevent USARCS from providing accurate information.

Fourth, field offices need to make the corrections noted on their "error reports," which are routinely sent to the field offices from USARCS. Error reports are listings of the mistakes noted on the field claims offices' diskette sent to USARCS at the end of the month. The errors are identified by the USARCS computer software during the monthly upload of data and are printed out on a listing by field office that contains the claimant's name, the claim number, and a brief synopsis of the error. In addition to educating the field TT database operators about the system and of the error, the report is a cue to the field claims officer of how well the administrative portion of the data input is being accomplished. A long error report could mean that the operator needs assistance in understanding the "do's" and "don'ts" of the TT database. If there are questions that cannot be resolved locally, tort claims division or the USARCS automation section should be contacted for assistance. On the positive side, most field offices are doing an exceptionally good job of keeping down the number of "fatal errors" which prevent the loading of data onto the system. However, some offices are having some degree of difficulty making the corrections, and some of the erroneous data is making its way onto the tort claims division system every month. A great deal of frustration is created during our effort to correct the data that in some cases is overwritten repeatedly by incorrect field data submissions each month.

Fifth, new claims must be entered onto the system in a timely manner. There have been instances where up to six weeks have gone by before the field office enters the new claim onto the system. In the meantime, the claimant's attorney has sent a copy of the claim directly to USARCS and it has been given a USARCS "field office" number, code "C01." Then, when the responsible field office eventually enters its claim onto the system, there are duplicate entries.

Integration of the "TT" database system with the tort claims division Armywide database has made it possible for USARCS to accurately track and account for nearly all Army tort claims. With your help and continued assistance in reviewing your entries, making prompt corrections, and "purging" outdated information, the system will become even better and more responsive to our needs. Without field office and tort claims division vigilance over the system, we will face the great nemesis of all computer systems, the dreaded "GIGO" (Garbage In, Garbage Out). COL Fulbruge.

Personnel Claims Notes

Automobile Insurance Covering POV Shipment

Officers who have USAA comprehensive insurance on their privately owned vehicles (POVs) are covered for damage incurred during government-sponsored shipment of the vehicle. USAA reiterates this fact annually, most recently on page 25 of the April 1990 *Aide* magazine. Because this is not a universal policy among insurance companies, some soldiers are not aware that their comprehensive insurance covers their POVs in shipment. Some claims offices are not checking for this type of coverage.

In accordance with paragraph 11-21*b*(5), AR 27-20, claims personnel must inform soldiers with insurance coverage—including comprehensive insurance which covers shipment damage—that they must file claims with their private insurers prior to or at the same time they present a personnel claim. Mr. Frezza.

Disapproval of Personnel Claims Based on Statute of Limitations

Before denying a personnel claim received shortly after the presumed expiration of the statute of limitations, it is important to check two factors: 1) the day of the week on which the two-year period ended; and 2) the date of receipt by the installation.

USARCS recently received a reconsideration request for a claim that had been denied under the statute of limitations. The soldier's household goods were delivered on 2 September 1987. The claim was postmarked 2 September 1989. The claim was not received in the claims office until 17 October 1989. No information was developed regarding the whereabouts of the claim between the mailing date and receipt by the claims office. However, the area claims office denied the claim, reasoning that the date of receipt, not mailing, is controlling. It informed the claimant that the latest date on which the claim could have been timely filed was 2 September 1989, and a claim would not be received on the same day it was posted.

On review, USARCS noted that the presumed deadline, 2 September 1989, was a Saturday and the following Monday, 4 September, was Labor Day, a federal holiday. In accordance with longstanding rules on computing the two years, if the deadline falls on a Saturday, Sunday, or holiday, the claim must be presented on the next workday—in this case Tuesday, 5 September 1989 (see DA Pamphlet 27-162, paragraph 2-13). Furthermore, the statute of limitations is tolled when the claim is received at the installation, not the claims office (paragraphs 11-7 and 11-8, AR 27-20, and paragraph 2-12, DA Pamphlet 27-162). In this case, the file was silent as to when the claim was received at the installation mail room. Accordingly, USARCS requested that the claims office attempt to determine the date of receipt at the installation. If it could be determined that the claim was received by the installation on or before Tuesday, 5 September 1989, the claim, if otherwise payable, could be approved. Mr. Ganton.

Affirmative Claims Note

Property Damage Claims

An area often neglected by recovery judge advocates in the property damage affirmative claims program is the "repayment in kind" option outlined at paragraph 14-8c, AR 27-20. Recovery judge advocates can effectively use this option to enhance their recovery program locally. Moreover, in an increasingly budget-conscious Army, this alternative is a way to get damaged property repaired without affecting the command's budget.

The recovery judge advocate may accept repair or replacement of damaged government property in lieu of payment of the property damage claim. When money is received to satisfy property damage claims, it is deposited in the general treasury account. The money normally does not go to the installation suffering the loss or damage. Few staff officers budget for repairs to government property; therefore, repair or replacement of damaged property at most installations is accomplished at the sacrifice of some other budgeted project or item.

With "repayment in kind," the property is repaired at no additional expense to the installation. The person liable for the damage or loss pays the firm or individual making the repairs. The staff officer responsible for the property, usually the DEH or the DOL, must certify satisfactory accomplishment of the repair or replacement before the recovery judge advocate may execute a release. The value of the repair should be credited as a property damage recovery and reported on DA Form 2938-R, Affirmative Claims Report. MAJ Morgan, Ms. Brackney.

Management Note

Claims Training

Some CONUS claims offices are still not budgeting funds to send personnel to the three levels of claims training workshops sponsored by U.S. Army Claims Service. Claims training is very important, particularly in light of the changes in the Army claims program that have taken place in the last few years, and claims training for new personnel is absolutely essential.

The three workshops that USARCS sponsors are the Basic Claims Workshop, the Advanced Claims Workshop, and the USARCS Charlottesville Claims Training Workshop. These workshops are explained in paragraph 1-6, DA Pamphlet 27-162. Attendance at these workshops is by nomination, and nominees who apply for the wrong level will not be approved for that level, but will be redirected to the appropriate level of training.

The Basic Workshop is held in the spring of each year. It is designed for nonattorney personnel and lasts two and one-half days. The Basic Workshop provides hands-on training in processing personnel claims and recovery actions for personnel who are changing duties or who have less than four years of claims experience. Attendance is limited to 72 persons, and a few spaces are held for nominees from the other military services and from the carrier industry. Nominees with more than four years of claims experience may be approved if space permits. Offices may send more than one nominee.

The Advanced Claims Workshop is held in the fall of each year in Baltimore. It is designed for more senior nonattorney personnel, and it also lasts two and one-half days. The Advanced Workshop is intended for nonattorney personnel with more than four years of experience. Because the course is designed around small discussion groups, attendance is limited to forty-five persons. Nominees with less than four years of experience will *not* be approved, and offices will generally not be allowed to send more than one nominee.

The USARCS Charlottesville Claims Training Workshop is held in the summer of each year at The Judge Advocate General's School in Charlottesville, Virginia, and lasts three and one-half days. This workshop is intended for attorneys and for senior claims persons whose primary duties are general claims office supervision or tort claims investigation. While there is one day devoted to personnel claims and recovery issues, the workshop is weighted toward tort claims processing, and the emphasis is on the "lawyering" of claims. Offices may send more than one nominee, but personnel who do not meet the necessary criteria will not be approved.

Even experienced claims personnel need periodic claims training. To get the most out of the limited number of people available for processing claims, staff judge advocates must budget for claims training and should include it in civilian performance plans. As these are "training" courses, not "conferences," local training (P81) funds can be used for military attendees. Claims training is one element of the Model Claims Office Program and is an item of interest for Article 6 visits. Mr. Frezza.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office,
FORSCOM Staff Judge Advocate's Office,
and TJAGSA Administrative and Civil Law Division

Labor Law

Smoke-Free Workplace

The Federal Service Impasses Panel (FSIP) adopted a VA proposal to ban indoor smoking at a number of hospitals, nursing homes, clinics, and outreach centers. *Department of Veterans Affairs, Veterans Health Services and Research Administration, and National VA Council, American Federation of Government Employees*, 89 FSIP 198 (1990). AFGE, which represents 118,000 VA employees, had sought to maintain the prior policy that permitted indoor smoking in designated areas.

The panel relied on scientific evidence that no amount of tobacco smoke inside buildings is healthy. The VA will phase out indoor smoking upon designation of outdoor smoking areas protected from the elements. Disputes over their adequacy or accessibility will be resolved through the grievance and arbitration procedures of the master agreement. The panel also restricted smoking to outdoor areas for the 75 employees of MacDill AFB's civil engineering squadron. *MacDill Air Force Base, Florida and National Federation of Federal Employees Local 153*, 90 FSIP 58 (1990).

Arbitration—Exceptions to Award

In a case in which NAGE hired a private attorney to represent the local in an arbitration, an arbitrator decided that the attorney did not have standing on his own to seek attorneys' fees. The local president and management sent a joint letter to the arbitrator in which they agreed not to pursue attorneys' fees. The next day the private attorney sent the arbitrator a letter requesting him to decide the attorney fee issue. The arbitrator determined that the local president's letter had rescinded the attorney's authority as representative and that the joint letter had withdrawn the dispute from his jurisdiction. The attorney filed exceptions to that ruling. The authority ruled that the attorney was authorized to file exceptions before FLRA, basing its finding on an affidavit from the national stating that it had retained the attorney to represent the local. It further found that the arbitrator's ruling that the attorney had no authority before him did not affect the attorney's authority to file exceptions with the FLRA. It then denied the exceptions as nothing more than disagreement with the arbitrator's findings on procedural arbitrability. Despite the fact that the FLRA had remanded the award to the arbitrator, the parties retained the power to resolve the dispute and withdraw the case from the arbitrator. *NAGE and Dep't of the Air Force, Langley AFB, VA*, 34 FLRA No. 134 (1990).

Negotiability—Accommodations for Handicaps

The authority held negotiable a union proposal that obliged the Navy to make every effort to place an employee who is physically unable to perform the duties of his assigned position in a different position at the same pay and grade or a closely related occupation by waiving qualification standards. *Portsmouth Naval Shipyard* 90 FLRR 1-1202, 35 FLRA No. 6 (1990).

Representation

Union representatives must be permitted to perform representational functions during meetings with management officials. The type of representation will vary depending on the nature of the meeting. In *McChord Air Force Base, Washington*, 90 FLRR 1-4064 (1990), an Office of Special Investigations agent committed an unfair labor practice (ULP) when he prohibited a union representative from speaking to an employee during an investigative interview. The authority also held that a management official, who was present but did not correct the restriction, also violated 5 U.S.C. §§ 7116(a)(1) and 7116(a)(8). In *Hill Air Force Base, Utah*, 90 FLRR 1-4062 (1990), a manager committed a similar ULP when he told a union representative at a grievance meeting to be quiet and to act as an observer. Unlike an investigative interview or formal discussion, which management initiates and controls, the union initiated the grievance meeting and had a right to determine how the grievance was presented, absent disruptive or unreasonable conduct.

Attorneys' Fees

The FLRA considered union exceptions to an arbitration award denying attorneys' fees after the union had prevailed on the underlying grievance. The arbitrator had earlier found that the GS-4 grievant had been performing the duties of a higher-graded position without the benefit of the CBA that required temporary promotion. He had ordered the agency to pay grievant the difference between the pay rate of her position and that of a GS-5. The union then sought attorneys' fees, arguing that the agency "knew or should have known that it would not prevail on the merits." The arbitrator denied the fee request, but the authority reversed. The arbitrator's findings show that the agency had failed to gather the evidence that proved that grievant had been performing higher-graded duties, information that was exclusively within the possession and control of the agency. "If agency management, represented by its labor relations officials, had been aware of that information and evidence, then the agency should have known that it would

not prevail.... The Arbitrator stated the advocate was unaware that the grievant's present supervisor would testify that the grievant was performing at the GS-5 level and when the supervisor testified to that, 'the advocate appeared to be in a complete state of shock.'" The authority remanded the award for a determination of a reasonable amount of attorney fees. *Dep't of HHS, Public Health Service, Region IV and NTEU*, 34 FLRA No. 139 (1990).

Equal Employment Opportunity Law

Handicap Discrimination—Alcoholism

MSPB continues to apply its ruling in *Hougens v. USPS*, 38 M.S.P.R. 135 (1988), in a manner making it very difficult for appellants to prevail on an alcoholism defense. The Army removed appellant from his WG-10 Overhead Wire Cable Splicer position for failure to maintain the government driver's license that was necessary for an essential function of his position—driving to work sites. After using a co-worker to drive appellant to his work sites for a few months, the Army determined that it was no longer cost efficient to do so and removed appellant. Appellant lost his state driver's license for refusal to submit to a breathalyzer test and his government license for failure to maintain a state license. The board held that because appellant was no longer technically qualified for his position, there was no accommodation that would enable him to perform the essential functions of his position. Even if appellant had been a qualified handicapped employee, the board stated he had failed to prove that his removal was solely because of his alcohol abuse. The Army had removed him because of his failure to maintain a driver's license, a direct result of his refusal to take the breathalyzer test. Appellant had presented no evidence that this failure was caused by alcoholism or even intoxication at the time. "Hence, the appellant's failure to meet an essential condition of his employment and his resulting removal were due to his own intentional and volitional actions and not solely because of his alcohol abuse." Further, the agency had made an adequate attempt to locate a position for appellant, under its duty to consider reassignment, by searching for vacant positions for which appellant qualified and which did not require a driver's license. The duty to reassign did not include the obligation to search "ad infinitum" or to create a position where none exists. *Malbou v. Dep't of Army*, 43 M.S.P.R. 588 (1990).

Security Clearance

In *Holmes v. Stone*, No. 89-4016 (C.D. Ill., April 11, 1990), the court granted the Army's motion for summary judgment. Plaintiff, a security specialist at the Armament, Munitions, and Chemical Command, Rock Island Arsenal, claimed that his suspension, demotion, and loss of security clearance were racially motivated. After concluding that the plaintiff had not properly exhausted his administrative remedies, the court held that it lacked subject matter jurisdiction to look behind the decision to revoke plaintiff's security clearance to determine whether that decision was racially motivated. The *Holmes* decision should be contrasted with the EEOC decisions (e.g., *Thierjung v. Durkin*, 90 FEOR 3096), in which the commission decided to review the issue to determine if the requirement for a security clearance was applied in a discriminatory manner.

Handicap Discrimination—Accommodation

Appellant, a GS-05 library technician in HHS, appealed to EEOC the final order of the MSPB denying her allegation of handicap discrimination (visual impairment) in the denial of a within-grade increase. Although the agency made numerous attempts to accommodate appellant's handicapping condition, the agency made no effort to provide appellant with a reader who could have helped her perform her duties. The supervisor testified that she felt appellant was not really working when she used a reader. Testimony revealed that the reader read titles to appellant who was performing the intellectual tasks that required knowledge of library functions and research skills. In deciding this case, the EEOC cited *Carter v. Bennett*, 651 F. Supp. 1299 (D.D.C. 1987), in which the court noted the reasonableness of accommodations such as persons to act as readers, special equipment and office space, and a decreased workload. The EEOC found that the agency failed to show that providing appellant with a part-time reader would have imposed an undue hardship. *Cox v. Sullivan*, 90 FEOR 3169 (1990).

Sex Discrimination

In 1980, a female bank employee began an affair with the bank's married assistant comptroller. Both were discharged in 1987 when the employee became pregnant with the couple's second child. In response to a sex bias claim, the bank claimed she had been fired for violating the bank's rule requiring decency and public morality. Moreover, the other female employees who became pregnant in the same time period were not let go. The court rejected this argument, holding that statistical comparisons are not so crucial in Title VII disparate treatment cases when the issue is individual treatment of an employee. "Were the rule otherwise," the court held, "the employer's first bite at the apple would be for free." The appellate court therefore upheld the lower court finding that the stated reasons for the discharge were a pretext for discrimination. *Cumpiano v. Banco Santander Puerto Rico*, 1990 WL 56100 (1st Cir. May 4, 1990).

Sex Discrimination

In *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), in which the high court provided guidance on burdens of proof in mixed motive cases, the D.C. District

Court (on remand) ruled in Hopkins' favor. The court found that the accounting firm did not prove by a preponderance of the evidence that it had legitimate reasons for denying a partnership to Hopkins. The evidence showed that sexual stereotyping affected the selection of partners. The court ordered Price Waterhouse to make Hopkins a partner and to award backpay. (Reported in Daily Labor Reporter, May 16, 1990).

Reasonable Time to Present Complaint

Pursuant to 29 C.F.R. 1613.214(b)(2), an employee and his representative have a right to use a reasonable amount of time to prepare and to present an administrative EEO complaint. In *Robinson v. Frank*, 90 FEOR 1062 (1990), the postal service committed reprisal discrimination when it denied the use of official time to a complainant's representative to assist the complainant to initiate a complaint. However, a plaintiff in an EEO civil action may not use official time and government resources to pursue suits against the government. *Schein v. Marsh*, No 1-89-1452-00E (N.D. Ga. March 27, 1990).

Waiver of Time Limits

In *Rennie v. Garrett*, 896 F.2d 1057 (7th Cir. 1990), the Seventh Circuit Court of Appeals joined other circuit courts of appeal that have held that the thirty-day time limit for a complainant to contact an EEO counselor is a statute of limitations subject to equitable tolling. In *Rennie*, the court overruled its prior decision in *Sims v. Heckler*, 725 F.2d 1143 (7th Cir. 1984), which held that the time limit was a jurisdictional prerequisite. Notwithstanding the *Rennie* decision, labor counselors should continue to urge EEO officers to reject untimely complaints in the absence of the particularized showing of good cause required in the regulation.

Enforcement

In *Curtis v. Mosbacher*, No. 88-0813 (D.D.C. March 30, 1990), 28 GERR 477 (1990), the court ruled that a Commerce Department employee must first seek EEOC enforcement of its order settling a discrimination case before filing suit.

The case appears to be the first construction of 29 C.F.R. § 1613.238(a), which provides that a complainant may petition the commission for enforcement of a decision issued under the commission's appellate jurisdiction. The court agreed that "ordinarily the use of the word 'may' suggests a degree of discretion." However, "[t]his common-sense principle of statutory construction ... can be defeated by indications of legislative intent to the contrary." "The comprehensiveness and specificity of the procedures for petitioning the EEOC for compliance" as well as the explanatory remarks in the Federal Register were cited to explain the requirement to exhaust administrative remedies before seeking enforcement in federal court.

Civilian Personnel Law

Whistleblowing

In its second substantive holding interpreting the Whistleblower Protection Act of 1989, the board decided in *Williams v. Department of Defense*, No. NY07529OS0119 (May 10, 1990), that filing an EEO complaint constitutes whistleblowing activity. The appellant who was removed for allegedly intemperate comments about a superior in a letter sought a stay after the removal was effected. The board, reversing the administrative judge, issued the stay and returned the employee to work. The board concluded that the employee had shown a substantial likelihood of success on the merits by showing that he had filed an EEO complaint and that the removal occurred close in time to the filing. *Williams* is significant because it blurs the distinction between whistleblowing protections in 5 U.S.C. § 2302(b)(8) and somewhat more circumscribed protections against retaliation for the exercise of appeal rights in 5 U.S.C. § 2302(b)(9). Although the Office of Special Counsel has deferred investigation of EEO-based complaints in the past, *Williams* may push OSC to open more investigations of this type.

Civilian Drug Testing

Certiorari has been denied in the case upholding the Department of Transportation (DOT) drug-testing policy. *American Federation of Government Employees v. Skinner*, 110 S. Ct. 1960 (1990). The DOT program provided for random drug tests for approximately half its employees, including air traffic controllers. In another drug testing development, drug testing has been barred for lawyers seeking jobs with the Antitrust Division of the Department of Justice, positions which do not require access to top secret information or affect public safety. *Willner v. Department of Justice*, DC DC No. 90-0535 (D.D.C. May 15, 1990). (Reported in Daily Labor Reporter, May 17, 1990).

Enforced Leave

In *Bivens v. Dep't of Navy*, 43 M.S.P.R. 450 (1990), the MSPB reviewed appellant's petition asking that the Navy be found in noncompliance with a board decision awarding appellant back pay. The Navy placed appellant on enforced leave after its physician had diagnosed appellant as permanently disabled because of high blood pressure. OPM then denied appellant's application for disability retirement, relying on its physician's opinion that, though appellant did have high blood pressure, the condition was not *permanently* disabling. Meanwhile, appellant successfully appealed the Navy's decision to

place him in enforced leave status. The board ruled that the leave constituted a constructive suspension without the procedural rights of 5 U.S.C. § 7513 and ordered appellant restored during the period of the enforced leave. The Navy then refused to provide back pay for the entire period in question, arguing that appellant had not been ready, willing, and able to work during all but one of the thirty-one months in that period. The board agreed. It evaluated the medical evidence from both its own and appellant's personal physicians to find that appellant had been unable to work during those thirty months. It also stated that OPM's denial of disability retirement did not create a presumption that appellant was in fact able to work. It ruled that the Navy had complied with the earlier final decision on the constructive suspension.

Effects of Prior Disciplinary Action for Discourtesy

The board modified an initial decision that had reversed appellant's removal for insubordination and delay in carrying out an order. When instructed by her supervisor to sign her performance standards, appellant had requested union assistance. When the supervisor directed her to return to work, she had allegedly slammed the document on her supervisor's desk and gone to see her second-line supervisor. She did not return to work for several minutes, despite several orders from her first-line supervisor to do so. The agency removed her for that misconduct. The AJ found that appellant was confused about the reason for the meeting with her supervisor and that she had lacked the requisite intent for the insubordination charge. He also found that the two- or three-minute delay in obeying the order to return to work was not unreasonable under the circumstances, so he did not sustain either charge. The board agreed with the ruling on the insubordination charge, but could find nothing in the record supporting the AJ's conclusion that the delay in obeying the order was excusable. It therefore sustained the charge. It considered the *Douglas* factors, noting that appellant had received "only two disciplinary actions during the preceding three-year period, and the record indicates that they were based on discourtesy rather than delay in following orders." In addition, appellant had ten years of satisfactory service and was confused about the nature of the document that she had been asked to sign. It reduced the penalty to a thirty-day suspension. *Ford v. Dep't of Navy*, 43 M.S.P.R. 495 (1990).

Attorneys' Fees

MSPB granted an appellant's petition for review of an initial decision that had dismissed his appeal as untimely. Appellant argued that he had made numerous efforts to ensure that his attorney was aware of the impending deadline for filing the appeal of his removal. He had continued to press until his attorney assured him that the appeal had been filed. In actuality, the attorney's secretary had told her boss that she had mailed the appeal on time. After the filing deadline had passed, however, the attorney discovered the letter on his secretary's desk. She abruptly resigned later that day. The board chose to follow the reasoning of several courts that have recognized "that it is inappropriate to apply the principle that an attorney's actions should be attributed to his client when the client has proven that his diligent efforts to prosecute the suit were, without his knowledge, thwarted by his attorney's deceptions and negligence." The board remanded the appeal for adjudication. *Dunbar v. Department of Navy*, 43 M.S.P.R. 640 (1990).

RIF Information

OPM has published a new Federal Personnel Manual (FPM) Supplement 351-1, dated 18 Sept. 1989, which covers OPM's revised instructions on reduction in force, transfer of function, and voluntary early retirement. Individual copies of the RIF instructions are available for purchase from the GPO for $45.00, GPO stock number 906-035-0000-6. The new supplement formally supersedes FPM Letter 351-22 and FPM Chapter 351. For further information and other materials, relating to RIF, contact OPM, Career Entry and Employee Development, Staffing Policy Division (202) 632-6817.

Labor Counselor News

About seventy-one percent of our currently listed 224 labor counselors responded to the 1990 labor counselor questionnaire. Although statistics are always subject to differing interpretations and their accuracy may suffer from inartfully drawn questions, the results of this first review of Army labor counselors reflects that we have a well-trained, experienced, committed force of civilian and military labor counselors. Following are some of the highlights of the questionnaire results.

Training and Experience

Almost one hundred percent of labor counselors have had some formal training. Seventy-five percent have been trained at TJAGSA in the Federal Labor Relations Course or the Graduate Course. Seventy-two percent have attended other continuing legal education courses. Seventy-two percent have been on the job more than one year, and fifty-five percent have been on the job more than two years. Responses from alternate labor counselors deflated the figures, which would have been higher otherwise. Some commands, particularly those overseas, show more turnover. Staff judge advocates and command counsel with military labor counselors must continue their efforts to keep them in their assignments as long as possible.

Time Spent on Labor and Employment Law

Sixty-two percent spend at least twenty-five percent of duty time performing labor counselor duties; thirty-three

percent spend more than fifty percent. Again, alternate labor counselor responses skewed these figures. Results within MACOM's seem to parallel MACOM workloads. If you spend less than twenty-five percent of your time in labor counselor work, keep your skills up by professional reading and CLE attendance.

Advice and Representation in Disciplinary Actions

Fifty-seven percent reported they review all disciplinary actions. AR 690-700, chapter 751, requires coordination on all formal disciplinary actions. Labor counselors should not let MER avoid the regulation unilaterally. MER helps thirty percent of you prepare papers and pleadings in MSPB cases. Although this question inartfully confused preparation of legal pleadings and all other papers, many responses suggested that MER may be doing the labor counselor's work at some locations. The labor counselor is the agency representative and should prepare all pleadings. MER's assistance should be limited to preparation of records in the CPO's control.

EEO Complaint Processing

Only forty-six percent said they see EEO complaints before acceptance or rejection. Paragraph 2-3f, AR 690-600, requires the EEO officer to give you complaints prior to acceptance. The burden is then on you to provide input before the five-day period for acceptance or rejection in paragraph 2-6a expires. We can do better in this area. On the other hand, we were pleased to see that well over ninety percent of you attend factfinding conferences and review all settlements.

Assistance in Labor Relations

Only about sixty-four percent reported that they provide representation in arbitrations and unfair labor practice complaints. This figure is not reliable because many respondents who have no labor relations work at their location apparently answered "no" rather than omitting a response. Nevertheless the responses did suggest that there is less attention paid to labor relations than in our other areas of practice. Labor counselors should represent the agency in third party proceedings consistent with the 1990 edition of AR 690-700, chapter 711. In arbitrations, we should help select the arbitrator (eighty-six percent who do the work said they participate in selection) and draft exceptions (ninety-five percent said they do). In ULP cases, we should do more than just represent the agency after a complaint issues. For example, we should attend interviews between investigators and management witnesses (seventy percent of those who do ULP work said they do). Seventy percent of all respondents who answered the question said they help in other labor relations matters. Of that number, ninety percent advise negotiating teams and eighty-seven percent review collective bargaining agreements.

Other Assistance to CPO and EEO

While the focus of labor counselor activity is rightfully on representation in adversarial proceedings, full service to our clients means assistance in other areas, like training (fifty-eight percent say they help), recruitment and placement (sixty-one percent pitch in), and affirmative action (fifty-seven percent report they provide advice). Representation in unemployment compensation cases is a labor counselor function. Only thirty-eight percent say they provide representation. Although that figure climbs almost ten percent when overseas responses are excluded, it indicates we are not paying adequate attention to this costly area.

Assistance in Private-Sector Labor Relations

A little over fifty percent say they provide support in this area to include labor standards. Recall that technical guidance in this area is available from LTC Terry Thomason in the OTJAG Contract Law Division. Ensure that this area is covered at your location, either by you or a contract lawyer.

Personnel Note

Appointment Prerequisites for Legal Administrator

The prerequisites for appointment to warrant officer were announced in Message, HQDA, DAJA-PT, 171530Z May 90, subject: Appointment Prerequisites: MOS 550A—Legal Administrator. This message modified the MOS qualifications contained in AR 611-112 and the prerequisites published in DA Cir 601 series. The text of this message follows:

SUBJECT: APPOINTMENT PREREQUISITES: MOS 550A—LEGAL ADMINISTRATOR PASS TO ALL STAFF JUDGE ADVOCATES, COMMAND JUDGES, LEGAL ADMINISTRATORS, AND ENLISTED PERSONNEL POSSESSING PMOS 71D or 71E

1. APPOINTMENT PREREQUISITES FOR WARRANT OFFICER MOS 550A, LEGAL ADMIN-

ISTRATOR, HAVE BEEN REVISED. FOLLOWING PREREQUISITES WILL APPEAR IN THE NEXT PUBLICATION OF DA CIRCULAR 601-XX-X, WARRANT OFFICER PROCUREMENT PROGRAM-FY XX. LEGAL SPECIALISTS OR COURT REPORTERS WISHING TO BE CONSIDERED BY THE FY 91 OTJAG 550A WARRANT OFFICER SELECTION BOARD MUST MEET THE FOLLOWING APPOINTMENT PREREQUISITES.

2. CONVENING DATE OF THE FY 91 OTJAG LEGAL ADMINISTRATOR WARRANT OFFICER SELECTION BOARD WILL BE ANNOUNCED IN A SEPARATE MESSAGE.

3. POC FOR THIS ACTION IS CW4 EGOZCUE OR CW3 RUNYON: AUTOVON 225-4717.

550A APPOINTMENT PREREQUISITES

A. MILITARY EDUCATION: SUCCESSFUL COMPLETION OF THE ARMY LEGAL OFFICE ADMINISTRATION COURSE OR MILITARY PARALEGAL PROGRAM (BOTH NONRESIDENT PROGRAMS AVAILABLE FROM THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY (JAGS-ADN-C), CHARLOTTESVILLE, VA 22903-1781.

B. CIVILIAN EDUCATION: POSSESS A CIVILIAN EDUCATION LEVEL OF 14 YEARS (I.E., 2 YEARS OF COLLEGE) OR HIGHER. AT LEAST SIX CREDIT HOURS MUST BE IN COLLEGE LEVEL ENGLISH. SUCCESSFUL COMPLETION OF THE ENGLISH COLLEGE LEVEL EXAMINATION PROGRAM (CLEP) IS THE ONLY SUBSTITUTE FOR THE ENGLISH REQUIREMENT. AT LEAST SIX CREDIT HOURS IN COMPUTER SCIENCE OR AUTOMATION COURSES. ACCEPTABLE SUBSTITUTES ARE: 120 CLASSROOM HOURS IN COMPUTER SCIENCE OR AUTOMATION SUBJECTS, OR DIPLOMA FOR EQUIVALENT NONRESIDENT HOURS IN COMPUTER SCIENCE OR AUTOMATION SUBJECTS.

C. MILITARY EXPERIENCE: HELD AND SERVED IN PMOS 71D (LEGAL SPECIALIST) OR 71E (COURT REPORTER) FOR FOUR YEARS AND HAVE ONE YEAR'S EXPERIENCE AS NCOIC AT THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY LEVEL OR HIGHER; OR ONE YEAR'S EXPERIENCE IN THE ADMINISTRATIVE OFFICE OF A GENERAL COURT-MARTIAL COMMAND SJA/JA OFFICE.

D. WAIVERS: FOR THE ENGLISH OR AUTOMATION EDUCATION REQUIREMENTS WILL BE PROCESSED ON A CASE-BY-CASE BASIS AND WILL BE GRANTED BY TJAG ONLY FOR EXCEPTIONAL APPLICANTS. WAIVERS FOR THE ONE YEAR EXPERIENCE AS NCOIC AT THE SPECIAL COURT-MARTIAL AUTHORITY LEVEL OR HIGHER, OR IN THE ADMINISTRATIVE OFFICE OF A GENERAL COURT-MARTIAL COMMAND SJA/JA WILL BE PROCESSED ON A CASE-BY-CASE BASIS AND WILL BE GRANTED BY TJAG ONLY FOR EXCEPTIONAL 71E APPLICANTS.

E. INTERVIEW: MUST BE PERSONALLY INTERVIEWED BY THE COMMAND SJA/JA OR DESIGNATED FIELD GRADE JA FIELD SCREENING OFFICER. THE INTERVIEWER WILL CANDIDLY EVALUATE AND REPORT THE APPLICANT'S KNOWLEDGE OF LAW OFFICE ADMINISTRATION, MANAGEMENT POTENTIAL, MOTIVATION, MILITARY BEARING, SINCERITY, GENERAL PHYSICAL APPEARANCE AND CONDITION, ORAL COMMUNICATIVE SKILLS, AND ANY OTHER MATTERS CONSIDERED APPROPRIATE. WHERE APPROPRIATE, SJA'S/JA'S SHOULD SEEK AN EVALUATION OF AN APPLICANT'S QUALIFICATIONS FROM THEIR LEGAL ADMINISTRATOR. THE REPORT WILL CONCLUDE WITH AN EVALUATION OF THE APPLICANT'S ABILITY AND POTENTIAL FOR ASSUMING LEGAL ADMINISTRATOR DUTIES IN A STAFF OR COMMAND JUDGE ADVOCATE OFFICE. FORWARD THE INTERVIEW REPORT TO HQDA (DAJA-PTW), WASH DC 20310-2205. CONTENTS OF THE INTERVIEW REPORT WILL NOT BE DISCLOSED TO THE APPLICANT EXCEPT AS AUTHORIZED BY LAW.

F. APPLICATION FORM: APPLICANT WILL INCLUDE THE FOLLOWING STATEMENT IN ITEM 35 (REMARKS), DA FORM 61, APPLICATION FOR APPOINTMENT: "I WAS PERSONALLY INTERVIEWED BY (RANK(S) AND NAME(S) OF INTERVIEWING OFFICER(S)) ON (DATE OF INTERVIEW) AT (PLACE OF INTERVIEW)."

SECURITY REQUIREMENT: MUST BE CLEARED OR CLEARABLE FOR ACCESS TO SECRET INFORMATION.

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Special Legal Assistance Officer Program

The Guard and Reserve Affairs Department, TJAGSA, is responsible for coordinating the Army's special legal assistance officer program. This very successful program is designed to provide legal services to active duty service members and other eligible personnel in those parts of the country where the individuals needing legal assistance support do not have ready access to

active duty military legal assistance officers. The Guard and Reserve Affairs Department is responsible for compiling a current roster of Reserve component judge advocates who are willing to provide legal services at no expense to active duty service members in return for receiving retirement points.

The special legal assistance officer program is prescribed in Army Regulation 27-3, Legal Assistance. Reserve component commissioned officers are authorized to provide legal assistance when they are *not* serving in an annual training (AT), active duty for training, (ADT), or inactive duty training (IDT) status, provided they are members of the JAG Corps, admitted to the bar of a federal court or the highest court of a state or territory of the United States, and have been designated by TJAG or TJAG's delegate as special legal assistance officers. TJAG has delegated appointment authority to the Commandant, TJAGSA. The appointments are for a three-year period and can be renewed.

Those Reserve component judge advocates who have been appointed as special legal assistance officers receive retirement points for the legal services they provide. The points are authorized IAW AR 140-185, Rule 16, Table 2-1. This rule authorizes the award of one retirement point for two hours of work in a day and a second point if eight hours of service is performed in one day. This program would especially benefit IMA's and those Reserve component judge advocates in the IRR. Additionally, the program can benefit those members of the Reserve component who are looking for additional ways in which to earn the fifty retirement points needed yearly to have a "good" year.

Those judge advocates serving as special legal assistance officers are covered by the malpractice protection provisions of 10 U.S.C. § 1054, which was enacted into law in November 1986. Under that statute and TJAG Policy Letter 88-1, Reserve Component Premobilization Legal Preparation, the Reserve component judge advocates providing legal advice are protected even if they provide that advice in a nontraining status. The statute provides that the U.S. Attorney General will defend any civil action for damages for injury or loss of property caused by the negligent or wrongful act or omission of any attorney, paralegal, or other member of a legal staff within the Department of Defense. The negligent and wrongful act must be within the scope of the duties or employment of the attorney or legal specialist. National Guard and Reserve judge advocates should promptly furnish copies of any process served on them to the local U.S. Attorney, the Attorney General, and the head of the agency concerned.

The Guard and Reserve Affairs Department serves as the coordinator for this program. When an active duty service member or other eligible person needs special legal assistance officer assistance, they or their active duty legal assistance officers contact the Guard and Reserve Affairs Department. They are then referred to those individuals living and practicing in the location nearest to where the legal problem exists. The program administrator can be contacted at commercial (804) 972-6380 or AUTOVON 274-7110, extension 972-6380. Those Reserve component judge advocates interested in being appointed as a special legal assistance officer should send their requests in writing to The Judge Advocate General's School, Department of the Army, ATTN: JAGS-GRA, Charlottesville, Virginia 22903-1781.

There is no limit to the number of Reserve component judge advocates who can participate in the special legal assistance officer program. Applications are welcome from individuals in all states and territories. Shortages of special legal assistance officers exist in the following locations: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Puerto Rico, Rhode Island, South Dakota, Utah, Washington, and the Virgin Islands.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1990

6-10 August: 45th Law of War Workshop (5F-F42).

13-17 August: 14th Criminal Law New Developments Course (5F-F35).

20-24 August: 1st Senior Legal NCO Management Course (512-71D/E/40/50).

10-14 September: 8th Contract Claims, Litigation & Remedies Course (5F-F13).

17-21 September: 12th Legal Aspects of Terrorism Course (5F-F43).

1-5 October: 1990 Annual CLE Training Program.

15-19 October: 27th Legal Assistance Course (5F-F23).

15 October-19 December: 123d Basic Course (5-27-C20).

22-26 October: 4th Program Managers Attorneys Course (5F-F19).

22-26 October: 46th Law of War Workshop (5F-F42).

29 October-2 November: 4th Procurement Fraud Course (5F-F36).

29 October-2 November: 104th Senior Officers Legal Orientation Course (5F-F1).

5-9 November: 25th Criminal Trial Advocacy Course (5F-F32).

26-30 November: 31st Fiscal Law Course (5F-F12).

3-7 December: 8th Operational Law Seminar (5F-F47).

10-14: 38th Federal Labor Relations Course (5F-F22).

1991

7-11 January: 1991 Government Contract Law Symposium (5F-F11).

22 January-29 March: 124th Basic Course (5-27-C20).

28 January-1 February: 105th Senior Officer's Legal Orientation Course (5F-F1).

4-8 February: 26th Criminal Trial Advocacy Course (5F-F32).

25 February-8 March: 123d Contract Attorneys Course (5F-F10).

11-15 March: 15th Administrative Law for Military Installations (5F-F24).

18-22 March: 47th Law of War Workshop (5F-F42).

25-29 March: 28th Legal Assistance Course (5F-F23).

1-5 April: 2d Law for Legal NCO's Course (512- 71D/E/20/30).

8-12 April: 9th Operational Law Seminar (5F-F47).

8-12 April: 106th Senior Officers Legal Orientation Course (5F-F1).

15-19 April: 9th Federal Litigation Course (5F-F29).

29 April-10 May: 124th Contract Attorneys Course (5F-F10).

8-10 May: 2d Center for Law and Military Operations Symposium (5F-F48).

13-17 May: 39th Federal Labor Relations Course (5F-F22).

20-24 May: 32d Fiscal Law Course (5F-F12).

20 May-7 June: 34th Military Judge Course (5F-F33).

3-7 June: 107th Senior Officers Legal Orientation Course (5F-F1).

10-14 June: 21st Staff Judge Advocate Course (5F-F52).

10-14 June: 7th SJA Spouses' Course.

17-28 June: JATT Team Training.

17-28 June: JAOAC (Phase VI).

8-10 July: 2d Legal Administrators Course (7A-550A1).

11-12 July: 2d Senior/Master CWO Technical Certification Course (7A-550A2).

22 July-2 August: 125th Contract Attorneys Course (5F-F10).

22 July-25 September: 125th Basic Course (5-27-C20).

29 July-15 May 1992: 40th Graduate Course (5-27-C22).

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

9-13 September: 13th Legal Aspects of Terrorism Course (5F-F43).

23-27 September: 4th Installation Contracting Course (5F-F18).

3. Civilian Sponsored CLE Courses

October 1990

1-2: PLI, Investing in the Troubled Company, New York, NY.

1-2: PLI, Securities Litigation, New York, NY.

1-5: GWU, Contracting with the Government, Washington, DC.

2-5: ESI, Competitive Proposals Contracting, Washington, DC.

3-4: ESI, Terminations, Washington, DC.

4-5: ABA, Legal Opinions, Chicago, IL.

4-5: PLI, Lender Liability Litigation: Recent Developments, San Francisco, CA.

4-5: ALIABA, Securities Law for Nonsecurities Lawyers, Washington, DC.

4-6: ALIABA, Pension, Profit-Sharing, and Other Deferred Compensation, Washington, DC.

7-11: SLF, Bankruptcy: New Associates, Dallas, TX.

7-12: NITA, Advanced Trial Advocacy Program, Washington, DC.

7-19: NJC, General Jurisdiction (Section II), Reno, NV.

8-9: PLI, Institute of Banking Law and Regulation, Chicago, IL.

8-12: SLF, Short Course on Antitrust Law, Dallas, TX.

9-12: ESI, ADP/Telecommunications Statements of Work, Washington, DC.

11-12: ALIABA, Appellate Practice, Charleston, SC.

11-12: LSU, Developments in Legislation and Jurisprudence, Lake Charles, LA.

11-12: PLI, Estate Planning Institute, New York, NY.

14-17: NCDA, Evidence for Prosecutors, Philadelphia, PA.

14-19: NJC, Special Problems in Criminal Evidence, Williamsburg, VA.

15-16: PLI, Section 1983 Civil Rights Litigation and Attorney Fees, New York, NY.

15-19: GWU, Administration of Government Contracts, Washington, DC.

16-19: ESI, Contract Negotiation, Washington, DC.

18-19: PLI, Advanced Construction Claims Workshop, New York, NY.

18-19: SLF, Annual Institute on Labor Law, Dallas, TX.

18-19: ABA, Criminal Tax Fraud, New York, NY.

18-19: PLI, Institute on Employment Law, San Francisco, CA.

18-19: CCEB, Western Briefing Conference on Government Contracts, San Francisco, CA.

18-19: PLI, Workshop on Legal Writing, New York, NY.

18-20: ALIABA, Creative Tax Planning for Real Estate Transactions, New Orleans, LA.

19-20: LSU, Maritime Personal Injury Seminar, Baton Rouge, LA.

19-21: NJC, Search and Seizure, Williamsburg, VA.

21-25: NCDA, Prosecuting Drug Cases, Reno, NV.

21-26: NJC, Conducting the Trial, Reno, NV.

21-26: NJC, Dispute Resolution, Cambridge, MA.

22-23: PLI, Secured Creditors and Lessors under Bankruptcy Reform Act, New York, NY.

22-23: PLI, Securities Litigation, San Francisco, CA.

24-27: MICLE, International Conference on Legal Services Marketing, San Francisco, CA.

25-26: PLI, Institute for Corporate Counsel, New York, NY.

25-26: PLI, Legal Ethics, New York, NY.

25-26: ABA, Legal Opinions, New York, NY.

25-26: ALIABA, Representing the Growing Technology Company, Dallas, TX.

25-27: PLI, Annual Computer Law Institute, New York, NY.

25-27: ALIABA, Chapter 11 Business Reorganizations, New York, NY.

25-27: ALIABA, Hazardous Wastes, Superfund, and Toxic Substances, Washington, DC.

25-27: MICLE, International Conference on Marketing Legal Services, San Francisco, CA.

25-27: ALIABA, Uses of Life Insurance in Estate and Tax Planning, San Francisco, CA.

26-28: NJC, Individual and Society, Cambridge, MA.

28-November 2: NJC, Advanced Judicial Writing, Reno, NV.

28-November 2: NJC, Handling Capital Cases, Orlando, FL.

28-November 2: NJC, Judicial Productivity, Fallen Leaf Lake, CA.

29-November 2: GWU, Cost Reimbursement Contracting, Washington, DC.

31: ALIABA, Professional Ethics and Responsibility: New Model Rules, Atlanta, GA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1990 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Requirement

Thirty-three states currently have a mandatory continuing legal education (CLE) requirement.

In these MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7-11c (Oct. 1988) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most of these MCLE jurisdictions. Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

State	Local Official	Program Description
*Alabama	MCLE Commission Alabama State Bar 415 Dexter Ave. P.O. Box 671 Montgomery, AL 36101 (205) 269-1515	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt but must declare exemption annually. —Reporting date: on or before 31 January annually.
*Arkansas	Office of Professional Programs Supreme Court of Arkansas 311 Prospect Building 1501 N. University Little Rock, AR 72207	—MCLE implemented 1 March 1989. —12 hours of CLE each fiscal year. —Reporting period ends 30 June 1990 the first year.
*Colorado	Colorado Supreme Court Board of Continuing Legal Education Dominion Plaza Building 600 17th St. Suite 520-S Denver, CO 80202 (303) 893-8094	—Active attorneys must complete 45 hours of approved continuing legal education, including 2 hours of legal ethics during 3-year period. —Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within 3 years. —Reporting date: 31 January annually.
*Delaware	Commission of Continuing Legal Education 831 Tatnall Street Wilmington, DE 19801 (302) 658-5856	—Active attorneys must complete 30 hours of approved continuing legal education during 2-year period. —Reporting date: on or before 31 July every other year.
*Florida	CLER (Continuing Legal Education Requirement Department) The Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (904) 561-5842, -5600; (800) 342-8060 Toll Free FL; (800) 874-0005 Toll Free US	—Active attorneys must complete 30 hours of approved continuing legal education during 3-year period, including 2 hours of legal ethics. —Active duty military are exempt but must declare exemption during reporting period. —Reporting date: 30 hours every 3 years, on or before last day of a particular reporting month specified for each member.

State	Local Official	Program Description
*Georgia	Executive Director Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8710	—Active attorneys must complete 12 hours of approved continuing legal education per year, including 2 hours of legal ethics. Modification effective 1 January 1990. —Reporting date: 31 January annually.
*Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342-8959	—Active attorneys must complete 30 hours of approved continuing legal education during 3-year period. —Reporting date: 1 March every third anniversary following admission to practice.
*Indiana	Indiana Commission for CLE 101 West Ohio Suite 410 Indianapolis, IN 46204 (317) 232-1943	—Attorneys must complete 36 hours of approved continuing legal education within a 3-year period. —At least 6 hours must be completed each year. —Reporting date: 1 October annually.
*Iowa	Executive Secretary Iowa Commission of Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 218-3718	—Active attorneys must complete 15 hours of approved continuing legal education each year, including 2 hours of ethics during 2-year period. —Reporting date: 1 March annually.
*Kansas	Continuing Legal Education Commission Kansas Judicial Center 301 West 10th Street Room 23-S Topeka, KS 66612-1507 (913) 357-6510	—Active attorneys must complete 12 hours of approved continuing legal education each year, and 36 hours during 3-year period. —Reporting date: 1 July annually.
*Kentucky	Continuing Legal Education Commission Kentucky Bar Association W. Main at Kentucky River Frankfort, KY 40601 (502) 564-3793	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 30 days following completion of course.
*Louisiana	Louisiana Continuing Legal Education Committee 210 O'Keefe Avenue Suite 600 New Orleans, LA 70112 (504) 566-1600	—Active attorneys must complete 15 hours of approved continuing legal education every year, including 1 hour of legal ethics. —Active duty military are exempt but must declare exemption. —Reporting date: 31 January annually.
*Minnesota	Executive Secretary Minnesota State Board of Continuing Legal Education 200 S. Robert Street Suite 310 St. Paul, MN 55107 (612) 297-1800	—Active attorneys must complete 45 hours of approved continuing legal education during 3-year period. —Reporting date: 30 June every 3d year.
*Mississippi	Commission of CLE Mississippi State Bar P.O. Box 2168 Jackson, MS 39225-2168 (601) 948-4471	—Attorneys must complete 12 hours of approved continuing legal education each calendar year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 31 December annually.

State	Local Official	Program Description
*Missouri	The Missouri Bar The Missouri Bar Center 326 Monroe Street P.O. Box 119 Jefferson City, MO 65102 (314) 635-4128	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 30 June annually.
*Montana	Director Montana Board of Continuing Legal Education P.O. Box 577 Helena, MT 59624 (406) 442-7660	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 April annually.
*Nevada	Executive Director Board of Continuing Legal Education State of Nevada 295 Holcomb Avenue Suite 5-A Reno, NV 89502 (702) 329-4443	—Active attorneys must complete 10 hours of approved continuing legal education each year. —Reporting date: 15 January annually.
*New Mexico	State Bar of New Mexico Continuing Legal Education Commission 1117 Stanford Ave., NE Albuquerque, NM 87125	—Active attorneys must complete 15 hours of approved continuing legal education per year, including 1 hour of legal ethics or code of professional responsibility subjects. —Reporting date: For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.
*North Carolina	The North Carolina Bar Board of Continuing Legal Education 208 Fayetteville Street Mall P.O. Box 25909 Raleigh, NC 27611 (919) 733-0123	—12 hours per year including 2 hours of legal ethics. —Armed Service members on full-time active duty exempt, but must declare exemption. —Reporting date: 31 January annually.
*North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58501 (701) 255-1404	—Active attorneys must complete 45 hours of approved continuing legal education during 3-year period. —Reporting date: 1 February submitted in 3-year intervals.
*Ohio	Supreme Court of Ohio Office of Continuing Legal Education 30 East Broad Street Second Floor Columbus, OH 43266-0419 (614) 644-5470	—Active attorneys must complete 24 credit hours in a 2-year period, 2 of which must be in legal ethics. —Active duty military are exempt, but pay a filing fee. —Reporting date: Beginning 31 December 1989 every 2 years.

State	Local Official	Program Description
*Oklahoma	Oklahoma Bar Association Director of Continuing Legal Education 1901 No. Lincoln Blvd. P.O. Box 53036 Oklahoma City, OK 73152 (405) 524-2365	—Active attorneys must complete 12 hours of approved legal education per year, including 1 hour of legal ethics. —Active duty military are exempt, but must declare exemption. —Reporting date: On or before 15 February annually.
*Oregon	Oregon State Bar MCLE Administrator CLE Commission 5200 SW. Meadows Road P.O. Box 1689 Lake Oswego, OR 97034-0889 (503) 620-0222 1-800-452-8260	—Must complete 45 hours during 3-year period, including 6 hours of legal ethics. —Starting 1 January 1988.
*South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 10 January annually.
*Tennessee	Commission on Continuing Legal Education Supreme Court of Tennessee Washington Square Bldg. 214 Second Avenue N. Suite 104 Nashville, TN 37201 (615) 242-6442	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt. —Reporting date: 31 January annually.
*Texas	Texas State Bar Attn: Membership/CLE P.O. Box 12487 Capital Station Austin, TX 78711 (512) 463-1382	—Active attorneys must complete 15 hours of approved continuing legal education per year, including 1 hour of legal ethics. —Reporting date: Birth month annually.
Utah	Utah State Bar Board of CLE 645 S. 200 E. Salt Lake City, UT 84111-3834 (801) 531-9095 800-662-9054	—24 hours during 2-year period, including 3 hours of legal ethics. —Reporting date: 31 December of second year of admission.
*Vermont	Vermont Supreme Court Mandatory Continuing Legal Education Board 111 State Street Montpelier, VT 05602 (802) 828-3281	—Active attorneys must complete 20 hours of approved legal education during 2-year period, including 2 hours of legal ethics. —Reporting date: 30 days following completion of course. —Attorneys must report total hours every 2 years.
*Virginia	Virginia Continuing Legal Education Board Virginia State Bar 801 East Main Street Suite 1000 Richmond, VA 23219 (804) 786-2061	—Active attorneys must complete 8 hours of approved continuing legal education per year. —Reporting date: 30 June annually.

State	Local Official	Program Description
*Washington	Director of Continuing Legal Education Washington State Bar Association 500 Westin Building 2001 Sixth Avenue Seattle, WA 98121-2599 (206) 448-0433	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 31 January annually.
*West Virginia	West Virginia Mandatory Continuing Legal Education Commission E-400 State Capitol Charleston, WV 25305 (304) 346-8414	—Attorneys must complete 24 hours of approved continuing legal education every 2 years, at least 3 hours must be in legal ethics or office management. —Reporting date: 30 June annually.
*Wisconsin	Supreme Court of Wisconsin Board of Attorneys Professional Competence 119 Martin Luther King, Jr. Boulevard Madison, WI 53703-3355 (608) 266-9760	—Active attorneys must complete 30 hours of approved continuing legal education during 2-year period. —Reporting date: 31 December of even or odd years depending on the year of admission.
*Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003 (307) 632-9061	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B136337	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
AD B136338	Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).

AD B136200 Fiscal Law Deskbook/JAGS-ADK-89-3 (278 pgs).

AD B100211 Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

Legal Assistance

AD A174511 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).

AD B135492 Legal Assistance Guide Consumer Law/ JAGS-ADA-89-3 (609 pgs).

AD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).

AD B136218 Legal Assistance Guide Administration Guide/JAGS-ADA-89-1 (195 pgs).

AD B135453 Legal Assistance Guide Real Property/ JAGS-ADA-89-2 (253 pgs).

AD A174549 All States Marriage & Divorce Guide/ JAGS-ADA-84-3 (208 pgs).

AD B089092 All States Guide to State Notarial Laws/ JAGS-ADA-85-2 (56 pgs).

AD B114052 All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).

AD B114053 All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).

AD B114054 All States Law Summary, Vol III/ JAGS-ADA-87-7 (450 pgs).

AD B090988 Legal Assistance Deskbook, Vol I/ JAGS-ADA-85-3 (760 pgs).

AD B090989 Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).

AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA- 85-5 (315 pgs).

AD B095857 Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).

AD B116103 Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).

AD B116099 Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).

AD B124120 Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).

*AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

AD B124194 1988 Legal Assistance Update/JAGS-ADA-88-1

*AD B142445 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-90 (175 pgs).

Claims

AD B108054 Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).

AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).

AD B087848 Military Aid to Law Enforcement/ JAGS-ADA-84-7 (76 pgs).

AD B139524 Government Information Practices/ JAGS-ADA-89-6 (416 pgs).

AD B100251 Law of Military Installations/JAGS-ADA-86-1 (298 pgs).

AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).

AD B107990 Reports of Survey and Line of Duty Determination/ JAGS-ADA-87-3 (110 pgs).

AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

Labor Law

AD B139523 Law of Federal Employment/JAGS-ADA-89-4 (450 pgs).

AD B139525 Law of Federal Labor-Management Relations/JAGS-ADA-89-5 (452 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

AD B135459 Senior Officers Legal Orientation/ JAGS-ADC-89-2 (225 pgs).

AD B140529	Criminal Law, Nonjudicial Punishment/ JAGS- ADC-89-4 (43 pgs).
AD B140543	Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 12-15	Joint Security Assistance Training (JSAT) Regulation	28 Feb 90
AR 190-6	Military Police, Interim Change I01	9 Apr 90
AR 600-75	Exceptional Family Member Program	23 Apr 90
AR 700-138	Army Logistics Readiness and Sustainability	30 Mar 90
CIR 11-87-1	Army Programs Internal Control Review Checklists, Interim Change 2	5 May 90
JFTR, Vol. 1	Joint Federal Travel Regulations, Change 41	1 May 90
PAM 25-30	Index of Army Publications and Blank Forms	31 Dec 89
PAM 27-173	Trial Procedure	20 Apr 90

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